VIII.

ARGUMENT

IN THE CASE

OF

THE STATE

vs.

THE BANK OF SOUTH CAROLINA.

SCIRE FACIAS

TO REPEAL A CHARTER

FOR MISUSER

IN SUSPENDING SPECIE PAYMENTS.

MAY TERM, 1843.

BY JAMES M. WALKER.

CHARLESTON:
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1843.

ARGUMENT.

MR. WALKER said, that he regarded the present case as the most important that had ever been submitted to the judiciary of this State. The pecuniary interests involved are, it is true, very great! but they are altogether forgotten when we consider the principles which it is proposed to establish. This is, too, a political prosecution, an exotic hitherto entirely unknown in our courts. It has been instituted to give "form and pressure" to a political idea, to invest the opinions of a party with the sanctity of law; and to endow our legislature with a power as unlimited as that of the parliament of England; an authority, which though often claimed by dominant parties, has been as often denied by the highest judicial tribunal of the union. To accomplish these purposes, your Honors are called upon to determine in favor of the State a question which, in the language of the Attorney General, is not a "question of law nor of fact,"* and which, therefore, you cannot determine *at all*, without an usurpation of power, and having done that much, you are asked to go farther, and declare that a majority of the legislature have the right to prescribe the judgment which you shall pronounce upon all questions, touching what that majority may please to consider "the political administration"† of the State. And for what purpose? To make the opinions of the present dominant party on the currency the law of the land. Before this court assents to these propositions, and becomes the organ of popular opinion, although expressed by so respectable a body as the legislature, it would be well to consider, that the chief, if not the sole, motive in this country for making the tenure of your offices permanent and independent, is, that you may interpose the

* 17th ground of appeal. † 2d *Ibid.*

law between individuals and the people—between citizens and the State. To require you, therefore, to gratify popular feeling, by determining this question in accordance with present popular opinions, is to urge you to a violation of duty.

It was from our confidence in the independence of this court, that the defendant appealed to the laws of the land for protection, when our State resounded with clamor against these institutions. Your Honors will remember by what a fierce shout of indignation it was followed. At that time the hustings—the legislative hall—and even the court house—the sacred temple of solemn, sober, meditative, justice—were the theatres of vehement denunciations against moneyed monopolies, and the loud applause of the admiring crowd rewarded the enunciation of these doctrines. Then, to doubt the infallibility of the legislature, an infallibility contrary to experience, and arrogant in assumption, as that once claimed by the papal power, was to be damned in the estimation of the multitude. Then, however, as now, the counsel for the banks believed that the true course was to appeal from the legislature to the tribunal appointed by the constitution to revise its acts. We did appeal. We opposed doctrines that we believed to be revolutionary and destructive; we invoked for our protection, and with success, a spirit more potent than ambition or party rage. I mean the spirit of the law—of that law which is the common right of all of us—which is inseparably implicated with our constitution, and whose principles have been the sure defence of liberty in all times.

But your Honors will be pleased to consider farther, that if popular will be made the expounder of the law in contests between the State and individuals, that stability and certainty in the administration of justice, which is essential, not only to the free enjoyment, but to the preservation of our rights, must be altogether lost. The will of a few, having the confidence of the many, will become the capricious rule of action, and the best men and the most useful institutions may be its victims. That popular opinion is either a safe or just rule of "political administration," is a doctrine contradicted by history, and most fatal in its consequences. To instil this principle into masses of men, to tell them that there will is an infallible rule of right—to teach them that they cannot err, is to expose them to all the ills of passionate caprice, and to render them the easy victims of corrupt ambition. All history

warns us against the dangers of political licentiousness, which is the unrestrained indulgence of popular will. And licentiousness, then, possesses the most dangerous and destructive energy, when seeming virtue approves and applauds it. I trust, therefore, that the court will consider this great question without reference to popular opinion. The judgment that it shall pronounce, will be tried, not only by the lawyers of this State, but of the union; and not only by the present generation, but by posterity.

The counsel for the prosecution, surveying the condition of the several States which surround South Carolina, find cause to congratulate themselves on the superior credit and condition of our banking institutions. Whilst the paper currency elsewhere has depreciated to a ruinous extent, and fraud and perjury become the common events of every day, not the first instance has occurred here. Our banks, on the contrary, are admitted to have been well and prudently managed; they are not suspected of insolvency; and, saving the present charge, are admitted to be deserving of the entire confidence of the country. It is not unworthy of notice, that the reward of their prudent management, and total freedom from fraud, is a prosecution to forfeit their charters. The worst mismanagement, and the most bare-faced fraud, could not receive severer punishment than it is now proposed to inflict upon these banks. But that such a disposition should exist, cannot surprise any person moderately acquainted with history. The course adopted on the present occasion is that which zealous persons have always chosen. "There is a wide difference," says an eminent political philosopher,* "between the multitude, when they act from a sense of grievance, or from zeal for some opinion. When men are thoroughly possessed with zeal, it is difficult to calculate its force. It is certain that its power is not in exact proportion to its reasonableness. It must always have been observed by persons of reflection, that a theory concerning government ('political administration,') may become as much a cause of fanaticism as a dogma of religion." In such cases, he proceeds to remark, that the *good* conduct of the object against which this zeal is directed, has no other effect than to irritate the zealous. At this moment the State is persuaded, that the only sound currency

* Burke.

is a specie currency. It is not surprising, therefore, that she desires to get rid of a paper currency, and to do this, the most effectual and speedy mode is to forfeit the charters. To do this according to the forms of the law, the counsel for the State have been compelled to draw their examples from the times of a Stuart. They have refurbished and repaired the worn-out furniture of ancient tyranny. They quote the arguments of Finch and Sawyer, the legal tools of the false-hearted Charles, and cite, as authority, the opinions of judges, upon whom history has long since pronounced judgment of infamy. Their leading case is that of the city of London, the charter of which was taken away upon alleged legal grounds, but, in fact, in order to give to the crown the control of the elections in the corporate towns which were at that time the refuge and citadel of popular rights; in other words, to establish as law the political idea of a tyrant, as the present proceeding is to give the legislature the control of our corporations, in order to establish its political idea. The history of this contest is one of the most instructive that a republican can study. Against the crown, were arrayed the original architects of our liberties—the men who laid the foundations of constitutional freedom in England. From them we have derived by lineal inheritance whatever of good we may enjoy as citizens. The rights of the people were then maintained by Treby and Pollexfen, the counsel for the corporation, against the chosen champions of an unlimited government. Read the history of this contest, written a century and a half after the termination of the case: "Charles had usually recourse to his lawyers for some plausible disguise for projected injustice. Upon this occasion they were not wanting, either in zeal or ingenuity. Sanders, the most profound lawyer, and the most profligate man at the bar, was the author of a new doctrine of law—that the slightest irregularities in the proceedings of a corporation worked a forfeiture. This dogma was certainly at variance with many decided precedents, and was supported by none. The exact question now propounded had never before been agitated. It could be supported by some few arguments from analogies. What proposition cannot? But, above all, it was willed to be law at court." "More than a year was consumed by the preliminary proceedings. When the case grew ripe for argument, the king found it necessary to make some al-

terations in the bench of judges, by whom it was to be tried. Pemberton, the chief justice of the King's Bench, was slow to be convinced of the validity of the new principle of law propounded by Saunders; he was, therefore, removed to the seat which North had vacated, (the chancellorship.) Saunders succeeded him, charged with the task of protecting and giving strength to his own offspring. Dolbern, one of the puisne judges, was found to have some doubts upon the points, and he was dismissed; and Withens, a ready convert, who had the further merit of having been persecuted by a house of commons, was appointed in his stead." "Thus, with a packed bench, early in 1683, the case came on for argument, Finch and Sawyer, on behalf of the crown, conducted the case with an ingenuity which all lawyers admire; but Treby and Pollexfen, in reply, adduced arguments and authority, by which none but a *corrupted* tribunal could fail to be convinced."* But the judgment was for the State. The memory of those judges have come down to posterity covered with shame, and the tyrant, by whose authority they acted, escaped justice by his death. It is strange that the same pretences—the same arguments—the same principles—which were then maintained by the Attorney General of a tyrant, should now be employed by the Attorney General of a democracy. It is passing strange, and perhaps can only be explained upon the old principle, that extremes meet—that the despotism of a monarchy and the despotism of a democracy differ chiefly in name.

But whilst it is admitted that as an adjudged case, it is without authority, yet it is contended, that if the principles of the case, the doctrine of forfeiture, had not been "coeval with the existence of England," "even the *loyal party* would not have brooked a direct violation of the laws." In the first place, the case is without authority, because the principles were "illegal and arbitrary;" if they had been legal and constitutional, the parliament never would have reversed the judgment. And in the second place, it is matter of history, that the last refuge of freedom in the kingdom was the city of London. The friends of the constitution looked with intense interest to "this last stronghold of liberty."† "With no par-

* Cooke's History of Parties, 1 vol. 225, London, 1836. Burnet. Roger Coke's Detection. Fox's James, 2d.

† Cooke on Parties, 225.

liament to withstand its encroachments, and with a bench of corrupt judges to register all its decrees, the crown was now become irresistible." "The city of London," says Mr. Fox, "seemed to hold out for a certain time like a strong fortress in a conquered country. But this resistance, however honorable to the corporation who made it, could not be of long duration."* It is not strange that the *loyal party* did brook this direct violation of the law, for their political principles led them to desire what Charles established by his *quo warranto*, an unlimited government. And the people endured it for a time, because the decision, says Roger Coke, opened a gap "to making a house of commons, and thereby deprived them of their natural constitutional mode of redress. But, at length, in the fulness of time, they did vindicate the ancient common law, and by a sort of *lex talionis* pronounced judgment of forfeiture, as if on a *scire facias* against the son for the crimes of the father.

Then it is said the same principles were recognized after the revolution, in the case of Sir James Smith, reported in 1 Shower, 240, 274. 4 Mod. 52. 12 Mod. 17. Holt, 168. Carthews, 217. Skinner, 293, 310. Now, in the report of the case by Shower, Eyre, J., says a corporation cannot be seized so as to bring it out of members into the crown. The corporation cannot be forfeited, and cites Palmer's Rts. 82. Holt was of the same opinion. In 4 Mod. the first point was, whether the judgment against the city of London was valid. If so, Smith was no alderman; but the case went off upon a different ground, and the validity of the judgment was not tested. It was said, *obiter dictum*, that a corporation might be dissolved. So in 12 Mod. same judge says, there are several judgments for seizing franchises, but none for seizing corporations—for what the king cannot have, judgment of seizure cannot give him. Holt, J. *Quære.* "Whether corporation could be dissolved, *but surely it may.*" *Obliter dictum.* But Holt was in a minority of one to ten; and the note of it in 8 Howell St. T., is taken from 2 Kyd on Corp., who had no other authority for his remark than the cases themselves, from which it appears, on the contrary, that the court were almost unanimous against the doctrine. In the case of the King v. Passmore, 3 T. R. 199, it was

* Fox's James, 2, p. 48.

held, that when a corporation is in such a state as to be incapable of acting or continuing itself, it is dissolved. The corporation had lost an *integral part*, and was therefore extinct. But the doctrine of dissolution by forfeiture, the principle of the city of London case was not involved. It is true, that in this case the court said that a corporation might be dissolved; and so it was said in 4 Mod. by Holt, J., but not by forfeiture but by loss of an integral part, or surrender. And so it appears from the cases referred to in 4 Mod., to wit, 8 Mod. 360; where the question was, did *surrender* destroy the being of corporation; 10 Mod. 346. Where election of officers was not made in time; 11 Mod. 101. Indictment against person for riotously hindering corporation from electing officers, involving question of loss of an integral part. So in the case of the King against Amery, the judgment was reversed upon appeal, on the same ground that the case of Sir James Smith was decided, to wit, the effect of the act of parliament upon the judgment in the city of London case. But in neither of these cases was the doctrine of dissolution by forfeiture involved in the judgment. It was a question of error in the form of the judgment. The city of London case, therefore, stands alone, the latest English decision upon the point, that the being of a corporation may be extinguished. That there are many *obliter dicta* derived from that case, both in England and America,* is unquestionably true, but it need scarcely be said that the frequent repetition of error will not make it law. From the year 1788, to the present time, the doctrine has, it is true, "never been doubted nor denied in England," simply because no lawyer has ever ventured to moot it in court.

Even Mr. Justice Blackstone, who, in his day and generation, was notoriously a tory, and, like Lord Mansfield, very doubtful authority upon a point of constitutional law, though the latter was unquestionably pre-eminent in other respects, commenting upon this case, can say no more in its favor, than that "in strictness of law the *proceedings* (not the principles,) were *sufficiently* regular.

* Cases cited in Mr. Attorney General's argument, 79. In the case of the Tombeckbee Bank, 2 Stewart's Rts. 30, the judge cites no authorities, but the counsel for the State cite 9 Cranch. 45. 2 Cowen, 769. 6 *Ibid*, 217. 19 Johns. 456. None in point. So in Pennsylvania case, 9 Wheaton, 663, is cited. Also, *obliter dictum*. *Ratio est anima legis*, says Lord Coke.

On the other hand, without a single exception from that time, every political writer and historian, of any authority in the popular party of England, have censured, in the most vehement language, the illegal and unconstitutional principles of that decision.

1. But although the forms of the law are perverted, and in a free country, arbitrary principles are advocated, yet so abhorrent of injustice are the rules of the common law, that we do not fear to submit our cause to a judiciary unterrified by popular clamor. Let us, then, admit, that a corporation may forfeit its being, and proceed to the discussion of the other questions involved in this case. It is, necessary, however, first, to consider the doctrine of forfeiture. Forfeiture is the punishment annexed by law to some illegal act or negligence in the owner of lands, tenements, or hereditaments. It was said by the old lawyers to be "*summum jus*"—"an odious procedure employed only by tyrants in the worst times." This court will not, therefore, be astute to presume an intention in favor of its exercise. The character of the times, too, in which this punishment was most frequently employed, will cause its propriety to be suspected. Nothing but a sense of duty will induce the court to imitate the example of crown judges, in the reign of the Stuarts—the more especially, when it is remembered, that the use of this expedient of "political administration," was one of the causes which led to the expulsion of that family from the kingdom. The true and only ground of forfeiture, whether for crime or breach of condition, is this: "a person, by violating the fundamental contract of his association forfeits the privileges which he claims by virtue of that contract. Upon this proceeds all forfeitures which are given by the law of life estates and others; whether the forfeiture be for misuser or for felony." 1 Black. Comm. 153. Now the ground upon which judgment of forfeiture against the defendant is claimed in this case, is misuser. Let us enquire, then, what is a misuser. Blackstone, in the passage above quoted, does not define the meaning of the word. "1. By misuser," (says he,) "as if a judge take a bribe, or a park-keeper kills deer without authority." It is very manifest, that a judge who decides wrongly, from ignorance, is not guilty in law, nor in morals, of the same offence, as if he so decided for the sake of a bribe. In both cases, however, the party against whom he decides loses his

property. So a park-keeper, who kills deer without authority, but from a mistaken opinion of duty, does not commit the same offence as if he killed them to convert the venison to his own use. 1 Coke Litt. 279, Thomas' Ed. The difference in these instances consists in the motive of doing the acts. If a judge were impeached by the legislature, on the ground of a wrong decision in the present case, would not his motives be considered? And Blackstone certainly regarded his two examples, as co-incident in principle, or he would not have so used them. It is, therefore, the motive—the intention—which is principally to be regarded. The burden of proving the intention may be on the defendant, but he is entitled to shew it. But then it is said, that "*mere non-user*" is cause of forfeiture of itself, and "*involves nothing more than a neglect of duty;* with which, however, my Lord Coke does not agree; "for," says he, "that it may be said once for all, non-user, of itself, without special damage, is no forfeiture of private offices, but non-user of public offices, which concern the administration of justice, or the commonwealth, is, of itself, a cause of forfeiture." 1 Coke Litt. Thomas' Ed. 277–8. The counsel for the State, however, insist that the intention is of no consequence, for the admitted reason, that the suspension charged in this case was without moral blame. But the case of the State of Indiana against the Bank of Indiana, 1 Blackford, 276, is conclusive. This is cited by the other side, as an important authority in their favor. In that case the *jury* found the defendant guilty of committing several acts *with an intent to defraud;* and the learned judge, who pronounced the opinion of the court, lays stress upon the fact, that the bank was found "guilty of *knowingly issuing with a fraudulent intention*, more than they had the means to redeem. Again, "when they knowingly transcend the bounds of honesty, by an exorbitant issue of paper, and thus wilfully destroy," &c. So the testimony allowed to go to the jury was not as to the single fact of suspension, but that "the bank was indebted about $373,000, and had at the same time but thirty-one dollars in specie, and no other available funds," and that it had *embezzled* $208,000 of money deposited by the United States. "So," says the judge, "had they issued no more paper than they were authorized to issue, and thereby kept their debts within the limits prescribed by their charter, they might still have been unable to redeem all their

paper, but in that case the presumption would have been, that at the time they become thus indebted, they had no intention to defraud their creditors." It is manifest, that this judge thought that the *intention* was of some consequence. He says, distinctly, that if the bank had kept within the limits prescribed by its charter, for its issues, and had been unable to redeem them, there would have been in that case no presumption of an *intention* to defraud. It is not, therefore, a mere technical fraud, but an *actual* fraud, involving dishonesty of purpose, that must be averred and found by a jury. And the counsel for the State admit, that "this judgment was given, not upon the ground of a mere suspension of specie payments. The Bank of Indiana was proved, as has been said, to be guilty of *flagrant* and *fraudulent* violations of its charter." I readily admit, that such a verdict would authorize a forfeiture. But the counsel for the State, so far from charging, do expressly deny, that the defendant is guilty of suspending with an intent to defraud.

Again, the right to keep a ferry is by grant of the State; for a misuser of which, forfeiture is the consequence. If the proprietor refuse to carry a traveller across the water course, is that, *ipso facto*, a forfeiture? Would he not be allowed to shew that the navigation was dangerous—that his boat would be swamped by the freshet? These questions must be answered in the affirmative. The motive of his refusal was good, and he has not forfeited his privileges. Yet the proposition maintained by the State denies this reasonable and just view of the duties of the grantee to the public. Whilst this is denied, however, in one part, it is admitted, it would seem, in another part, of their argument. In replying to the objections made in the Circuit Court decision, to the correctness of the pleadings, they contend, with great earnestness, and at some length, that the facts stated in the declaration do amount to a charge of "wilful," "culpable delinquency"—"originating in bad faith,"—"of mischievous tendency"—"intentional misdemeanor." And, again, that the bank was guilty of "culpable delinquency, of rather a flagrant character." It was unnecessary to contend, that the declaration substantially charged these facts; all of which imply more than mere technical fraud, if the failure to charge them was unimportant. Indeed, the ground upon which the forfeiture is claimed, is, that the defendant has acted with bad faith towards the

State—has not used "good faith" in fulfilling its obligations; and yet they assert that it is immaterial what were the motives of the defendant.

It is admitted that a corporation may act "wilfully;" but it is said, "that fraud is not predicable of a corporation." In the first place it is not easy to perceive how a corporation can have a will, without that will being either good or bad. And a corporation can, no more than any human being, be presumed to will an act to be done, without some motive. The law may not permit the motive to be considered, but the act and the will are, nevertheless, the result of some motive. But on principles of law this is not true; fraudulent intention may be imputed to a corporation. Mr. Justice Marshall says that money corporations may commit torts. 3 Peters, 409. The ground upon which this rule is established, is this, that they may do great injury by means of agents, having no property to answer for the damages recovered against them. 4 Sergt. and Rawle. 6. When the act done, as treason or murder, cannot be punished *ciriliter* but *criminaliter*—though the corporation order it, the agent is alone responsible. For, as it is said in the city of London case, you cannot hang up the common seals. But if a majority of corporators should command a trespass, and it was done, unquestionably the corporation would be liable in trespass *vi et armis*. Private corporations are liable in actions of trover, for damages resulting from trespass and torts, committed by their agents, under their authority. 2 Kent, 284, and cases cited. So in our reports, 2 Hill, 571. Mr. Justice Evans says, "a private money corporation may be sued in trespass." And in the same case, Mr. Justice Harper says, "that in some instances an action of trespass may be maintained against a corporation, I do not question, though many authors have expressed a contrary opinion," and he shews, conclusively, that the contrary opinion is erroneous. So a corporation may be a disseizer, according to Lord Ellenborough. 16 East, 8. So in Massachusetts, a writ of entry surdisseizin was brought, and no exception taken to it on that ground. 6 Mass. 332. Now disseisin was the *violent* termination of seizin by *actual ouster*. It is clear, therefore, that a corporation may be charged with having committed an act with force and arms. So trover will lie against a corporation. 16 East, 6. Now this is an action for the wrongful conversion of goods. "If the de-

fendant obtain them under color of contract, trover cannot be maintained, *unless fraud be proved.*" 1 Chitty Pl. 177. If a corporation obtain gold and silver ingots, by color of contract, for a particular use, may it not appropriate them to a different use? to recover them, *fraud* must be proved. 7 Taunton, 59. 1 B. and C. 514. The fraud here meant is not mere *legal* fraud; in the first case, Gibbs, C. J., instructed the jury on the question of fraudlent intention, and the jury found that the transaction was "fraudulent—undertaken, knowingly, with an intent to defraud;" and in the last case, the court said, that if the goods were obtained with a "preconceived design of not paying for them, that would be such a fraud as would vitiate the sale." On a perusal of them, it will be seen that there is no act in these cases which a corporation might not do. And so argue the counsel for the State, who admit that the Bank of Indiana was not guilty of a "mere suspension," but of flagrant and fraudulent violations of its charter—distinguishing between legal and actual fraud. So an action will lie against a corporation for a false return to a writ of mandamus. Vidian's Ent. p. 1. It states the return as *falsely* and *maliciously* made. Here, then, is authority in point, that a corporation may act falsely and maliciously. Why, then, may it not be guilty of a libel? It may commit trespass *vi et armis*—trover—torts—be false and malicious, it may act wilfully, and yet fraud cannot be imputed to it. If any regard is paid to the reason of the rule which makes the corporation answer for a trespass done by its orders, it is clear that it may be guilty of slander. May not a company pass a resolution setting forth that a certain named person is a cheat, a thief, &c., &c.? The secretary may be a pauper; to sue him, therefore, would be idle. Is it not, therefore, within the reason of the rule to sue the corporation? Nor does this exempt the officer who publishes the slander. And in the city of London case, "the mayor, commonalty, and citizens, of the city of London, in common council assembled," to wit, the corporation are charged by the Attorney General with having acted "*unlawfully, maliciously, advisedly*, and *seditiously;* again, to have acted "*in contempt* and *scandal* of the king and his government, and for raising *sedition* and *disturbance of the peace*; and concludes, that for these "*crimes*" the corporation has forfeited its charter. So in the judgment of the court, the second ground of forfeiture is

"*extortion;*" and the third is, that the petition "was *scandalous* and *libellous.*" 8 Howell, S. T. 1269. Why, then, may it not be guilty of actual fraud? But it is said that this would make the corporators, who opposed the slander, or the trespass, or the fraud, punishable equally with the guilty—that the corporation's funds ought not to be applied to relieve the responsibility of the guilty individuals. The answer to that, is, that this is a *scire facias* to forfeit a charter belonging as well to corporators who have refused, as to those who were desirous of accepting the provisions of the act of 1840.

But it is argued, that it is unnecessary to aver a fraudulent intention in a *scire facias*, for misuser, and we are referred to a precedent. It is said by the counsel for the State, that this *scire facias* is drawn after the precedent in 2 Lilly's Entries, 418, (which is certainly very high authority,) and that contains no such averment. Now, in reading the caption of the precedent, it will be seen that Lilly calls it a *scire facias to repeal a patent* granted by William and Mary to the company of copper miners, for *nonfeasance.* And we presume he knew whether the *scire facias* was for nonfeasance or for misuser, or for both. And it will be found, on reading the precedent, that the first and second allegations, upon which forfeiture is claimed, are non-users, and the third is in substance, that this company, by color of their patent, have unlawfully raised transferrable stock, and have assigned and transferred this stock, when, by the letters patent, such stock was not intended or designed to be collected and raised, and transferred, or assigned, against the form of the statute, &c., &c. Now this third "breach does not" (in the language of the Attorney General,) "appear to be like the two first, a violation of either the express or implied condition of the charter, but of a recent act of parliament." It must be admitted, that a *misuser* can only be committed against express or implied conditions. The franchises must be granted, or there can be no misuser of them; but the third breach is of a late act of parliament—not of expressed or implied conditions. If, therefore, the third ground was one of the causes upon which forfeiture was claimed, it ought not to have been inserted in a *scire facias.* It is, clearly, a charge of *usurpation*, for which *quo warranto* is the proper remedy. Bac. Abr. Information. A. 4.

But, undoubtedly, Lilly understood his precedent. And the

true construction seems to be this, that although the company had lost its charter by non-user for nine years, nevertheless it afterwards created and transferred stock unlawfully, against a late act of parliament. If it had continued not to use its charter, it would not have been necessary to sue out a *scire facias*, to forfeit it, but after being virtually extinct, it undertook to do acts which only a living corporation could do—hence a *scire facias* was issued. To attempt to restrain it, in the exercise of any powers by a *quo warranto*, would have been to acknowledge its legal existence for every other. For a *quo warranto* is to restrain a corporation which takes upon itself to do acts not authorized by their charter. It is to curb usurpations. But the object of the case under consideration was to *dissolve* the corporation, for non-user—hence a *scire facias* was used; if it had been to restrain an usurpation, *quo warranto* would have been the remedy. The precedent in Lilly, then, though *perfect* in case of a non-user, does not pretend to be sufficient for "*non-user, misuser, and abuser.*" It is no argument in favor of *scire facias* for *misuser*, to say that in case of *non-user*, it is unnecessary to aver fraudulent intention. On the contrary, the neglect to use powers is, of itself, sufficient, being an abandonment of rights granted; they are derelict, but before they are *re-granted*, the fact, that they are derelict, must be judicially proved. But in misuser, the powers granted are not abandoned, but are said to be used against the intention of the grantor, in a way different from what was intended—in bad faith—dishonest, &c., &c. Whilst, therefore, in the former case, it is sufficient to allege the abandonment; in the latter, it is necessary to allege the bad faith, the fraudulent intention, with which the powers granted are used. So that the precedent in Lilly, is no precedent in the present case.

Again, it must strike an unprejudiced mind with surprise, that the motive of an act which is represented to be fatally hostile to the well-being of a whole people, "subversive of the constitution," and "destructive to their liberties," should be totally unimportant. If the consequences are considered, the injury to private fortune—"the loss of confidence at home"—"the destruction of the character and credit of the country abroad"—"regular business interrupted"—"the fulfilment of contracts rendered impossible"—"honest industry without employment," or "robbed of its rewards"—

in a word, the incalculable mischief, physical and moral, inflicted upon society by suspension—and such is the catalogue of consequences attributed to it—then suspension is an offence of greater enormity than murder. If these are the consequences, then suspension is a crime within the definition of the Marquis of Beccaria: "Crimes," says he, and *the Attorney General*, "are only to be measured by the injury done to society." Surely, then, justice requires, that as the motive in the case of a charge of murder is considered, that it should also be considered, when the charge is so much more atrocious.

Again: a crime or misdemeanor is an act committed or omitted, in violation of public law, either forbidding or commanding it. The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this, that private wrongs or civil injuries are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals. Public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community in its social, aggregate capacity. 4 Black. Com. 5. Now this *scire facias* is founded upon the allegation, that the great public objects of the grant are defeated, and perverted by a suspension; that it is a violation by the defendant of its duties to the whole community, considered as a community in its aggregate character. The prosecution is by the State; and Chancellor Kent says, 2 vol. 313, speaking of *scire facias* and *quo warranto*, in his Chapter on Corporations, "Both these modes are at the instance, and in behalf of the government. The State must be a party to the prosecution, for the judgment is, that the parties be ousted, and the franchises seized into the hands of government." Yet this is said not to be a criminal prosecution. What quality of a criminal prosecution does it want? The State prosecutes; the word is Chancellor Kent's—the offence is against the public—the compensation is for the benefit of the public.

It is manifest, therefore, that if the views taken by the counsel for the State, of the nature and consequences of suspension be correct, that it is a high crime and misdemeanor. The intent of the act is then of essential importance, and therefore ought to have been alleged in the proceedings. 1 Chitty Pl. 252. 2 Stark Ev.

587. 1 Hoveden on Frauds; 26. For want of this allegation, the State is first in error, and the demurrers must be overruled. From the same principles that I have laid down, it is a necessary consequence, that a suspension of specie payments without an intent to defraud, is no cause of forfeiture.

2. But, for the sake of argument, and to expose the fallacy which lies at the foundation of the whole argument of the counsel for the State, let us adopt the view, that this proceeding is merely "an action to rescind a contract." P. 97. The fallacy is first found in the construction given to the nature of a *scire facias*. In certain cases, we admit that a *scire facias* is held to be an action. 2 Saunders, 72, ns. But no case can be cited in which it is held to be an action in the sense in which the word is used by the counsel for the State, to wit, like an action for money had and received. It is not an action "for the recovery of a debt, or of damages for the breach of a contract, or a specific chattel, or a satisfaction in damages for some injury to the person, personal or real property." This is the list, given by Mr. Chitty, of all personal actions,* and under one of these classes, is money had and received. The *scire facias* cannot, therefore, be like the action for money had and received; and, besides, money had and received lies only *after* the contract is rescinded. "*When* the contract is rescinded, the common count for money paid under the agreement will lie." Chitty on Contracts, p. 488-9. In fact, the *scire facias* is, as here used, a prerogative writ, to which the State alone is entitled, and so it is admitted to be in another place by the Attorney General. It is not a writ for money, or a specific chattel, but a writ or writing sent to the defendant, calling upon him *to shew cause*. To call this proceeding, therefore, an action "like money had and received," in the sense used by Chitty, is without authority. It is no more, and as much an action in the present instance, as a *quo warranto* information.

Still, if it be an action to vacate a charter—to rescind a contract—"like an action for money had and received by the vendee against a vendor, for breach of warranty of soundness in the thing sold," then it must be governed by the rules that govern all such contracts.

*1 Chitty Pl. 110.

To rescind a contract, it is a well settled rule, that it ought to appear that "at the time of the sale the property sold was subject to some permanent physical defect, calculated materially to affect its value." 1 Bailey Rts. 651. So, "an action for money had and received will not lie where the property has turned out to be unsound, unless there has been a return of the property, or, at least, a tender of it, or where there has been an entire failure of consideration." 2 N. and M'C. Rts. 65. 2 M'C. 432. Now, it is not pretended, that at the time of the sale by the State to the stockholders of the charters, that there was any failure of the consideration given by the stockholders; and if the defect or failure arose after the sale, the vendee cannot recover at all. Nor was it an entire failure of the consideration, defeating the whole objects of the grant, for the suspension charged commenced in 1837; so that from 1832, the date of the renewed charter, until the suspension, the State had the benefit of the contract. And in the case of one party having partial benefit, it is clear that he cannot rescind *in toto*. Chitty on Con. 574. Moreover, to rescind, the parties must be restored to the identical situation in which they were at the time of the contract; so that the State ought to have tendered the *bonus*, and the benefits derived from the bank, before it demanded a recision of the contract. Cases cited above, 2 N. and M'C. 65. 2 M'C. 432. The proposition stated by the counsel, "that if such a degree of unsoundness be proved, as defeats the object of the purchase, the vendee is entitled to a recision of the contract, and to recover back what he gave," is, therefore, incorrect. The unsoundness must have existed *at the time of making the contract*—by inserting these words into his proposition, the rule of law is properly expressed.

We have dwelt upon this point, because the whole argument of the counsel depends upon the proof, that a misuser is merely "a breach of warranty, in which it is wholly immaterial whether the warranty was made in good or in bad faith." And, taking this view, have shewn from authority of our own courts, that the State is not entitled to rescind the contract.

3. And here we will observe, upon "the great question in this case," and "the question on which the counsel for the State triumphantly say, they have never been able to induce their antago-

nists to meet them." If the counsel for the bank know what is meant by the counsel for the State, when they speak of the "great question in this case," it is, whether or not suspension, having reference to its effects and consequences, is a cause of forfeiture. "It can hardly," say they, "be controverted, that the consequences of men's acts, as they affect the interests of society, constitute the only legitimate foundation of punitive justice, by human tribunals; and without having reference to the inevitable and probable consequences, no act can be, with justice, deemed *criminal* by society. It is, certainly, not more unreasonable in the murderer, to insist that his only offence is stabbing *per se*, and that it is in the highest degree unjust to hang him for the ensuing death, which was a mere consequence, than it would be to contend, that in estimating the character 'of suspension *per se*,' all the consequences should be excluded from consideration." In other words, and we quote the language of the Attorney General, to determine whether any acts be a forfeiture, "we are simply to look to the consequences of these acts upon the public objects for which the corporation was created. And here it may be proper to remark," (they continue,) "that to characterize acts by their consequences, is certainly no novelty." For this, they quote Beccaria on *Crimes*—not on Contracts.

Now, the counsel for the bank take leave to say, that if the suspension of specie payments be merely a violation of contract, *civiliter*, as is alleged by the State, that the consequences do not enter into the consideration of the question. In other words, that the counsel for the State do not perceive "the great question" in the case, and they, not the counsel for the bank, have avoided its discussion. The counsel for the bank admit, that it is no novelty to characterize *criminal* acts by their consequences; and that they constitute the only legitimate foundations of punitive justice by human tribunals. And the counsel for the bank furthermore admit, that the Marquis of Beccaria is authority on the true principles of punishing *crimes*. Hence it is, that in a previous part of this argument, I have contended that suspension, if it be an illegal act, is a crime, and therefore the intention must be considered. But the counsel for the State contend, on their side, that suspension is a mere breach of contract, and yet say that the consequences must be considered. Now, the counsel for the bank

undertake to aver, that no authority can be shewn to establish the position, that the consequences affect the existence of any contract. If the acts which produce the consequences complained of, are in pursuance of the contract, the consequences cannot make the acts illegal. And if the acts are not in pursuance of the contract, they are violations of the contract, whether they have consequences or not—case in point—1 Barn. and Adol. 416. "And it seems to be a general rule, that if a party be in the prosecution of legal act, an action does not lie for an injury resulting from an inevitable or unavoidable accident, which occurs without any blame or default on his part." 1 Chitty Pl. 148. Whatever may be the consequences of a contract, made without fraud in the beginning, however ruinous to one party, they are not the subject of judicial consideration, before a breach of the contract is proved. So, if the charter be a contract, then the first step to prove, is the breach, when that is done the consequences or damages, or money paid, may be shewn. And if suspension be a breach, then it is a cause of forfeiture, whether the good people of the State suffer damage or derive benefit from it. Nobody doubts that every person is responsible for the consequences of his acts, when these acts are illegal; but nobody but the counsel for the State ever imagined that a party must make compensation for doing an act that he was authorized by his contract to do. We say, that the acts done by the bank, to wit, the suspension was legal, was not a breach, and the counsel for the State to prove that it was not legal—that it was a breach, point to the consequences—the damages to society.

We will admit, for the sake of argument, that the inevitable consequences of suspension are injurious. Yet we deny that it is *therefore* a breach of the contract. The counsel for the State have a single point to prove, and that is, that suspension, with or without consequences, is a breach of the contract. The consequences and the damages are synonymous in all civil actions. "*When* there has been a breach of the contract, the plaintiff must necessarily be entitled to some damage; such damages as may be necessarily presumed to result from the breach of contract, need not be stated." 1 Chitty Pl. 371. (Cited by the Attorney General.) These citations confirm our remark, that proof of the breach of the contract precedes proof or consideration of the damages or consequences. But the counsel for the State reverse the natural

order of things. When we demand proof of the breach, they assume the proof of the breach, and point to the consequences. The truth is, that instead of the counsel for the bank, it is the counsel for the State, who avoid the "great question." They pendulate from crime to contract, without regard to the ineffaceable distinctions between them.

If we have satisfactorily shewn, that the consequences of any act do not determine its legality, the whole argument of the counsel for the State, in reference to loans, discounts, and deposits, is out of place. As an argument, before the legislature, deliberating upon the propriety of granting this charter, it would have been unanswerable. But the charter has been granted. It stands for judicial construction, which must be made, if it be a contract, as it is asserted by the counsel for the State, according to the law of contracts. By that law, the plaintiff must shew a breach of contract before he can enter upon proof of his damages.

The same error is found also in that part of the argument, in which it is asserted to be an "unquestionable legal position, that the bank is responsible for the necessary and inevitable consequences of the suspension charged, and that the question, whether such a suspension is a cause of forfeiture, depends upon these consequences, with reference to their effect upon the public objects of the charter." Without meaning to take a captious, unfair, verbal exception, and they deprecate the suspicion, the counsel for the bank submit, that the necessary inference from the words of the counsel for the State, is, that the acts done by the bank, to wit, the suspension, is not, of itself, a violation of the charter, but "the consequences of that act, with reference to their effect upon the public objects of the charter," are violations. If we understand the proposition, it is, that, though the suspension itself is no cause of forfeiture, the consequences of it are so injurious, that they must produce forfeiture. Now we have already shewn the utter want of legal authority for this proposition. Hence it is, that in an "action to redress an injury, it is not necessary, either to allege or prove consequences," which are the "necessary and inevitable" result of acts. When there has been some breach of the contract the plaintiff must be entitled to some damages, &c. Such damages as may be presumed *necessarily* to result from the breach of contract, need not be stated in the declaration. 1 Chitty Pl.

371. But it is manifest, that the proof of the breach of contract is first to be made; that the "necessary and inevitable consequences" are not considered before the breach is proved. Yet the counsel for the State assert, that suspension is a clear violation of the charter, *because* the consequences of it are the "failure, defeat, and frustration," of the public objects of the charter. It is clear, therefore, that if this *scire facias* be an action on a contract it is sufficient, in order to establish a right to a forfeiture to prove the breach of the contract, without reference to the effect that its consequences may have upon the public objects of the charter. Such is the rule, without exception, in the law of contracts. But the counsel for the State, knowing the consequences of meeting this, the really great question in the case, jump the breach, and point to the consequences; we insist, that the bank in suspending, did a legal act, and that no action lies for the inevitable and necessary consequences of legal acts. If the bank is to be made liable for the consequences, it must be first proved that it has done an illegal act.

The argument is, however, as we have said, entirely fallacious. To avoid the necessity of enquiring into the intention, they take refuge in the doctrine of "rescision of contracts," but with what little advantage, we have already shewn. They have manifestly been led astray by a fancied similarity or analogy between the present proceeding and an action for rescision of contract; and have then argued as if these very different things were the same. This mode of argument has long been used in criminal prosecutions for political offences. When precedents in point are wanting, "when they do not suit exactly," says Junius, "the defect is supplied by analogy."

4. Again, it is said, that this is a "continuing contract—a proposition entirely inconsistent with the proceeding." However, the writers on the law of contracts divide them into executed and executory; these may be also either express or implied. A continuing contract is therefore either executed or executory, and we presume that it is used in the sense of an executory contract on the present occasion. The distinction between them is thus put by Chancellor Kent, 2 vol. 450: "If, for instance, one person sells and delivers goods to another for a price paid, the agreement is

executed, and becomes complete and absolute; but if the vendor agrees to sell and deliver at a *future* time, and for a stipulated price, and the other party agrees to accept and pay, the contract is *executory*." The time when the consideration passes from one party to the other seems, therefore, to be the test, whether a contract is executed or executory. Here let us observe a difference. Mr. Chitty, in his Pleadings, 1 vol. 324, after stating that considerations are, 1st. Executed—2dly. Executory—says, to which may be added, 3dly. Concurrent—4thly. Continuing considerations. He then proceeds, 4thly. "In the continuing considerations, the declaration generally states, that in consideration that the defendant had become and was tenant to the plaintiff of certain land, &c., he undertook, during the continuance of the tenancy, to use the premises in a tenant-like manner," &c. And for this, he cites various cases. It will be seen, upon looking into them, that the contract was executory—and the distinction to which we allude, is this, that there may be an executed promise, with an executory consideration, either concurrent or continuing, but there can be no *executed contract* with an executory consideration; for in the latter case, not only the promise must be made, but the consideration must have passed; the seller must have delivered the goods, and the buyer must have paid the price. We do not, therefore, imagine that the court can come to the conclusion, that the charter is a continuing contract—an executory contract. For, in the case of Fletcher v. Peck, 6 Cranch, 87, it is said by the Supreme Court, that "a contract is a compact between two or more persons, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particulor thing. A contract executed, is one in which the object of the contract is performed, and this differs in nothing from a grant. Under a fair construction of the constitution, grants are comprehended under the term contracts. *A grant is a contract executed.*" Applying these principles to the present case, the charter is a grant, and therefore an executed contract. Now, to make a contract executed, the consideration must pass at the time that the contract was made—or, in other words, the contract was executed when the consideration was given. It follows, that the State received the consideration of the charter at the time it was granted, and no

subsequent failure of consideration can affect the existence of the contract, as we have already shewn.

The counsel for the State affirm, too, that the consideration of the grant was the payment of specie during the twenty-one years ensuing the grant; this is precisely the case quoted from Chitty, and they are, therefore, continuing contracts. We have already shewn, that a grant, or charter, is not a continuing contract, in the opinion of the Supreme Court. It is clear, therefore, that according to the principles of contracts, the payment of specie is no part of the consideration of the charter.

5. But it may be said, that our argument proves too much, to wit, that a charter is not a contract, and, therefore, it may be repealed or revoked, at pleasure, by the legislature. A little attention to the language of the court, in the case of Fletcher and Peck, will solve the difficulty: "Where a law," says the court, "is, *in its nature*, a contract—*where absolute rights have vested under that contract—a repeal of the law cannot divest those rights.*" That explains the true nature of a charter. It is a great principle of morals—it is a fundamental rule of all just governments, not to destroy the property of its citizens, and to induce them to invest their property in any business, and suddenly to forbid the prosecution thereof, would be tyrannical. Hence the court say, where absolute rights have vested under that charter, a repeal of the law cannot divest these rights. It is a contract thus far, that it prevents the legislature from doing the great injustice of repealing a law, upon faith of which, persons have invested their property in a particular business—and by that repeal, destroying their property. Wisely—justly—and upon great principles of morals, the Supreme Court have held, that the charters of private corporations are, in their natures, contracts. With public, political corporations, they have no concern—for by the constitution, the political administration of the domestic affairs of the State are entrusted to itself. Experience has justified them in their interference in behalf of the former, and their neglect of the latter. The city of Charleston, for instance, has done numerous acts not authorized by its charter, without incurring even the charge of misuser—whilst the defendant, although charged with but one act, is in danger of forfeiture.

6. The idea, that a charter is a mere common contract, like a promissory note, or a contract of hiring, seems to have arisen from a literal construction of certain loose phrases. For example, the counsel for the State quote the following words of Mr. Justice Washington, in reference to private corporations: "The obligation imposed upon them, and which forms the *consideration* of the grant, is that of acting up to the end and design for which they were created by their founder." 6 Wheaton, 658. So 3 Term Rts. 246. Now we have already shewn, that the consideration of the charter was according to the principles of all executed contracts, received by the State, at the very time the grant was made. The accomplishment of the public objects, intended by the legislature, may, therefore, be a duty, and the neglect of them a just cause of forfeiture; but not upon the ground, that the consideration has failed. It is true, that they must act up to the "end and design of the founder;" but this is an implied condition, and not the consideration, of the grant. Mr. Justice Washington manifestly meant a condition, in the sentence above quoted; "the obligation imposed upon them, and which forms the *condition* of the grant, is that of acting up to the end and design of the founder;" otherwise there is no distinction between grants upon valuable consideration, and without valuable consideration; for political, as well as civil corporations, are bound to act up to the end and design of the founder, but the latter are not contracts on that account, but on account of the consideration which they have paid for the charter. So in Bacon's Abr. G. Corporations, it is said, "also a corporation may be dissolved by misuser or abuser, for all franchises flow from the bounty of the crown; so there is a tacit or implied *condition* annexed to such grants, which, if broken, forfeits the whole franchise. So 1 Black. Com. 485. It will be noticed, also, that Bacon uses the words which are peculiarly apt to express a condition—he says, a tacit or implied *condition*, *annexed* to a grant. So in 4 Kent, 120. 2 Coke Litt. p. 2, Thomas' Ed. "A condition is a qualification *annexed* to an estate, by which, upon a particular event, it may be created, enlarged, or defeated." Having shewn that charters are not contracts in the same sense that a promissory note is—that the doctrines of rescision of contracts, and of continuing contracts, are entirely inapplicable—the whole argument of the counsel is manifestly without a foundation.

7. It is agreed, that this charter (8 Stat. at Large, p. 1,) is obligatory upon the State as a contract, and that it is a grant for valuable consideration. It is also called a record, and ought therefore "to contain the utmost truth and certainty." 2 Black. Comm. 346. If the king's grant is upon valuable consideration, it shall be construed strictly for the patentee, for the honor of the king. Chitty Prerog. 394. So a deed imports a consideration, and is for the advantage of the *grantee alone*, and, therefore, if there is any doubt in the sense, the words are to be taken most forcibly against the grantor, that he may not, by the obscure wording, find means to evade it. Treat. on Eq. by Fonbl. 1 vol. 451-2. So *conditions are to be construed against those for whose benefit they are intended.* 1 *Sumner's C. C. Rts.* 439. The same principle is expressed in the law maxim, that the words of a deed are to be taken most strongly against the grantor. Let us apply this rule to the charter. There are no express words making suspension a cause of forfeiture. It is admitted, that the law inclines against this condition, to wit, forfeiture, even when expressed. 1 Saunders, 287. Cases cited. Statutes made for the advancement of trade and commerce, and to regulate the conduct of merchants, ought to be perfectly clear and intelligible to persons of their description. Judges, therefore, when clauses are obscure, will lean against forfeitures. 3 Taunton, 177. But it is said, that these cases are inapplicable—that the court exhibit no reluctance to enforce the feudal law of forfeiture, even as to estates. Now, no case can be found, in which our American courts have decided, that there had been a forfeiture of the estate of a tenant for life or years, by reason of a breach of duty. 4 Kent, 428, n. And the case cited from Rice's Reports, Redfern v. Middleton, 459, is no authority to the contrary, because it is of the nature of contingent interests, to be destroyed by feoffment—and a feoffment is a legal and proper act, which is not the case, as it is alleged, with suspension. It would be authority in point, if there had been trustees to support contingent remainders, who had entered upon the feoffee, and then pretended that by the feoffment the feoffor had lost his estate. The court would have then been called upon to decide on the effect of a feoffment on the estate of the feoffor; not, as in the case cited, its effect upon the contingent interests. And no case, as said by Chancellor Kent,

can be found, in which a tenant for life or years has forfeited his estate by a breach of duty. But can forfeiture, then, be inferred or implied from the words of the charter? Now, after reciting the usual incidents of an incorporation, to sue and be sued, have common seal, &c., the charter proceeds, "and generally to do and execute all and singular such acts, matters, and things, which to them shall or may appertain to do, subject, nevertheless, to *such* regulations, restrictions, limitations, and provisions, as *hereinafter* shall be prescribed and declared." Among these regulations, restrictions, &c., &c., are penalties, expressly imposed, to wit, upon directors, for over-issues—in case of dealing in any thing but specified articles, a forfeiture of treble value of the goods—and in case of insolvency, all who have held at any time within a year previous to the insolvency, or who may, at the time thereof, hold stock, shall be liable, to twice the amount of the shares, &c. Now, if these words were used in a contract between individuals, can it be doubted that they would exclude the implication, that any *other* regulations, &c., not expressed, existed. To infer that forfeiture is the penalty of suspension—to suppose that other and indefinite penalties existed, does seem to deprive the record of some of its utmost truth and certainty, and permits a laxity of construction palpably opposed to the rule that construes it, strictly for the patentee, for the honor of the king. And such is the opinion of Judge King, in the Pennsylvania case; in this charter, the powers and authorities are given, not "subject to indefinite and inferential restrictions but to the rules and restrictions thereinafter provided. And thereinafter is to be found a series of restrictions, many of them urgent enough; *exprssum facit cessare tacitum*, is equally a maxim of common law, and of common sense." The principle is without exception, that where the parties reduce their contracts to writing, the obligations and *rights* of each are described by the instrument itself. 1 Peters, 591. The more especially is this rule of construction applicable, if the law is intended to wrest property from any individual. 4 Gill. and Johns. 1. It is not only, therefore, a penalty not expressly imposed, but one that cannot be implied, without directly contravening the settled law. It is impossible to come to any other conclusion, than that the only restrictions, &c., intended to be imposed, are those which are expressly mentioned in the fundamental articles of the consti-

tution of the bank. It is certainly very unaccountable, that the chief, if not the only motive, which, it is said, induced the legislature to make the grant, to wit, the payment of specie, should be omitted. As it is well put by the Chancellor, in 1 M'Cord Ch. Rts. 490, "It certainly does appear very extraordinary, that the party (himself interested,) holding the pen, and stating the terms of the contract, even to minute expences, should omit so *vital* a clause as that alleged to have been omitted by him from mistake, or *from thinking it unnecessary.*" The present is the first instance in which a party interested in the making of a contract, and holding the pen, thought it *unnecessary* to insert in the deed the *vital* condition—one which he valued above all others, and which he was most anxious to preserve. As, in the case cited, it must be declared, that the contract in this case was drawn by the State, and it was its own fault if it did not insert all the provisions of the agreement.

We have seen, too, that there are express penalties imposed, to wit, in case of excess, the directors are personally liable, without the lands, &c., of the corporation being exempt; see 2 Stewart's Rts. 30; that for dealing in other than specified articles, the trustees, or their agents, not the corporation, though the dealing was for the benefit of the corporation, are liable for treble the value of the articles, and this penalty is *for the benefit of the State*, that in case of failure the stockholders are personally liable for twice the amount of their stock, and this expressly includes all who have, within a year before the failure, as well as those who are stockholders at the time of the failure. Thus the legislature have provided in the charter for mismanagement, which might be *without loss*, as well as for failure or bankruptcy *with loss*. To every possible case is affixed a suitable and severe penalty. Yet, although the very ground of the present claim of forfeiture, in the words of the Attorney General, "the very same misuse," to wit, suspension, which must be synonymous with mismanagement, either with or without loss, is provided against, it is contended against every principle of construction, that another penalty must be implied. And for what purpose? not to benefit persons holding the notes of the bank, in time of suspension—not to restore to them the money lost by the alleged depreciation of the notes—not to prevent future suspension, for the act of 1840 allows it, provided the banks

give the State the *lion's* share of the usury, as it is termed,—in fine, not to effect the alleged object of this suit, to wit, the preservation of a currency convertible at all times, upon demand, into gold and silver, legal current coin—for suspension, which is now legal, is synonymous with inconvertibility. What good purpose can then be effected by establishing the right to forfeiture? It will not, as we have seen, give the creditors of the bank more security—it will not secure to the State a sound currency. We admit, that it will effect one purpose, however, which is the only conceivable object of this proceeding; it will deprive corporations of their independence on any authority, but that of the law; it will establish the principle of the city of London case, "that the slightest irregularity in the proceedings works a forfeiture of charter," and will give to the legislature the power to decide at pleasure, unrestrained by any fore-known rule, what shall be considered a cause of forfeiture. Even "the lawyers," to whom "Charles usually had recourse," never invented "a more plausible disguise for projected injustice." This, however, can be accomplished only by breaking down those ancient landmarks which wise judges have formerly set up to mark the limits of judicial discretion. *Expressio unius est exclusio alterius.*

So, not only by the strict rules of the common law, but by the principles of equity, must this condition be excluded. "In the same manner, most covenants bear some *slight* exceptions and conditions, (but in all these cases it is strictly required, that not so much *as one probable conjecture* appear to the contrary; *tale oportet sit quod, pro natura actus, credi debeat exceptum,*) for otherwise, it would be easy to *thrust* an obligation upon a man, against his will. Yet, were too great a license given to these *secret and implied reserves*, there is scarcely any covenant which might not be either annulled or evaded." Treat. on Eq. by Fonbl. 1 vol. 466. Now is forfeiture "some *slight* exception and condition" against which *not so much as one probable conjecture* appears to the contrary?" Or is it not one of these "secret and implied reserves," "thrust" into the deed, "to annul and evade it?" The rigorous exaction of any subsequent conditions, which destroy estates, is said to be "*summum jus*, and hardly reconcileable with conscience." 4 Kent, 129. In what terms, then, ought we to speak of the rigorous exaction of *secret* and *implied reserves*, *indefinite* in their

nature, proved by *inferences* and *thrust* into a covenant to annul and evade it?

To avoid the force of the argument on this point, the counsel for the State say, "the feudal law of forfeiture of estates affords but a feeble ground of analogy in relation to the forfeiture of franchises, for abuse, which stands on an entirely different foundation." P. 89. But in a subsequent place they find it necessary to admit, that forfeiture for crimes—for alienation in mortmain—or to aliens—or by particular tenants—depends upon the same principle, and the application of this principle to a suspension of specie payments, is, they say, too obvious to require illustration. P. 128-9. Besides, in a former part of our argument, we cited a passage from Blackstone, which expressly admits, that in all forfeitures for crimes or misuser, or alienation of estates, the same principle prevails. 1 Black. Comm. 153. Nothing, therefore, has been said by the counsel for the State, to take away the force and applicability of the cases cited in Saunders. These shew, that so far from implying a forfeiture, the court will lean against the expressed.

But it is said, that "when confiscation is not in question, the court exhibits no reluctance to enforce the feudal law of forfeiture, even as to estates." Now, if you can imply a forfeiture, why not imply confiscation? But the court is reluctant to enforce confiscation. Why? because it is an ancient barbarity—like forfeiture, it is "repugnant to the genius of a free country." 1 Eden, 253. Still it is the old common law consequence of forfeiture.* The argument, that is sufficient to create an implied forfeiture, is equally sufficient to enforce confiscation; for the latter, by the common law, is more certainly the consequence of the former, than forfeiture is, of a breach of the implied condition of a charter. But it is said, that confiscation is not the object of this proceeding, but "simply to vacate the charter." To support this view, that part of the charter is cited, which provides, that in case of dissolution by expiration of charter, "or any other dissolution," the property of the bank shall be vested in the directors, in trust, for the stockholders. Now it is submitted, that adopting the principle contended for by the State counsel, that the State can lose no

* 1 Black. Com. 297. 1 Kent, 386. Public Laws, S. C. 48. Constitution of South Carolina, Art. 7.

right by implication, the dissolution here meant, was a dissolution by any other means than by forfeiture. For it is not reasonable, nor according to intendment of law, to presume that the bank would violate its faith, and forfeit its charter. The presumption of law was, that it would do its duty, and so the legislature must be regarded as having supposed. And in the Indiana case, so inevitable a consequence of forfeiture, was confiscation held to be, that notwithstanding the legislature had provided expressly for the collection of the debts of the corporation, by commissioners, the court decided that the debts were extinguished and confiscated. And if confiscation be the necessary consequence of forfeiture, does not the existence of the right of forfeiture directly conflict with the intention manifested by the legislature, that the property of the corporation should be applied to the payment of its debts? Forfeiture and the payment of debts are utterly inconsistent. A judgment of forfeiture must, therefore, destroy the property of thousands of citizens at the same time that it "puts out the light" of the corporation. It is to such a consummation that the argument of the counsel leads. They meet the argument by stating, that the present proceeding is "*simply* to vacate a charter." The difficulty in the way of implying a forfeiture is evidently, therefore, not removed by reference to this part of the charter.

Again; there is no necessity for the law of forfeiture, to afford complete redress to a creditor. All the common law remedies except, of course, imprisonment, which is not part of the *lex contractus*, may be employed against a corporation. Are these not sufficient? Will not a *fieri facias* take the banking house—the books—the papers—the specie—the whole visible tangible property of the bank? It is true, that the execution creditor could not recover the debts, but he could prevent the bank from doing it, by seizing its vouchers. Could any more complete prostration of an institution be effected? Can a judgment of seizure on *scire facias* effect more than a *fieri facias?* In both cases the property is lost to the bank, and in neither case does it go to the plaintiff in execution. Moreover, when the charter was granted, in 1801, the bankrupt act was in existence, and it is clear, from the words of the charter, that reference was had to the remedies of that act, in the making of the charter. *The remedy was, therefore, a part of the contract.* 2 M'Cord, 23. Now the repeal of that law, can-

not operate to make the remedy against the bank more onerous and severe. 7 Watts, 301. At that time, the remedy for suspension was a commission of bankruptcy, and forfeiture would not have been thought of. The repeal of that act takes away the remedy under the bankrupt act, but it does not create nor restore forfeiture. A State may make changes in the remedies—may provide new ones—but in doing so, it cannot alter vested rights—cannot change nor impair contracts. If the changes impair the rights and interests of the owners, they are as much violations of the contract, as if the legislature directly overturned these rights and interests. 8 Wheaton, 17. The legislature intended, that in case of bankruptcy, the remedy under this statute should be applied; not the violent and destructive remedy of forfeiture. For the two are inconsistent, forfeiture produces confiscation and loss of property; a commission of bankruptcy secures it to the creditors. And as an efficacious remedy for suspension, it is highly recommended by Mr. Gallatin. "A law," says he, "which shall declare it to be an act of bankruptcy on the part of all those who issue notes or evidences of debts, to be put in circulation, as money, to continue for a certain length of time, to decline or refuse to redeem in specie, such notes or bills, would afford the most general and efficient preventive and remedy that can be devised. It would be sufficient to arrest the evil—to place all the States on a footing of equality—and to restore and maintain the soundness of all the local currencies." Again, a mandamus to remove the directors would have been granted. The power of amotion is necessarily incident to every corporation. If there be no special provision on the subject in the charter, the power of removal for a just cause resides in the whole body. The just cause is some offence that has immediate relation to the duties of the party as a corporator. 2 Kent, 297. It is true that mandamus is granted only to persons having interest in the corporation, but the reason of the rule would authorise the Attorney General to move for it, for he contends, and it is the foundation of this proceeding, that the State has a deep interest—is one of the contracting parties to the charter. No corporator's interest can, therefore, equal that of the State, and the offence is done by the directors, in a matter having direct relation to their duties as corporators. In the case of Rex v. St. John's College, Skin. 549, S. C. 3 Salk. 230, it was held, that a mandamus

may be directed to a corporation, commanding it to remove certain persons for non-compliance with a statute. So, in this case, the directors might have been removed, and others who would not have suspended, been then elected. This, too, would have punished the guilty alone, and not, as in the case of a forfeiture, confounded the innocent with the guilty. But it is said, that a corporation which cannot be made to perform its duties, but by perpetual suits, is a public nuisance, and the interests of society require it to be abated. As to the present defendant, this is mere assumption, for no suit, previous to the present, ever was instituted to compel performance of its duties. We do not hesitate to admit, that a body of stockholders, who should obstinately persist in electing persons to office who had been removed for breach of duty, would deserve to lose their charter. But before the stockholders are punished for the acts of their officers, it would seem to be only common justice to give them the opportunity to remove these officers. In this case, the State never required their amotion, but ordered the stockholders to adopt certain alterations of the charter, upon pain of forfeiture. It is said, however, that such is the power of a money corporation, that no individual will dare to use these remedies—that the State must, therefore, interfere to protect its citizens. To an individual, or any number of them, who should call upon the State for its aid in such a case, she might, with great propriety, answer, *first help yourselves*—the law favors the diligent. But upon no sound principle can any government interfere between its citizens—the stockholders and the people in general. To the usual remedies, between man and man, they ought always to be left; and more especially, when their private remedies are amply sufficient. We submit, therefore, that it is clear, not only that the ordinary remedies are sufficient, but even were they not, that the existence of the penalty of forfeiture is totally inconsistent with the provisions of the charter.

8. Again, the directors cannot, in that character, do any act which will cause a forfeiture. They are mere agents, whose powers are limited by their letter of attorney—the charter. In order to bind the principal, "the act done must be within the scope of the authority committed to the agent. In other words, his authority or commission must be punctitiously and properly pursued." Story

on Agency, 156. Now there is nothing in the charter which can justify the directors in doing an act that may produce forfeiture. It exceeds their powers, and in such case, it is a "wilful act," beyond the scope of his authority, for which the principal is not responsible. 8 Term Rts. 553. 1 East. 106. But then it is argued, that the principal is bound to appoint agents who will perform their duty, and is responsible for default. For this, we are referred to Story on Agency, 313; but the cases cited in that place, only prove that the principal is liable where the act is not manifestly beyond the scope of the agent's power. And it is equally well settled, that if the act is a wilful excess of the authority given, in all such cases "the proper remedy is against the immediate wrongdoers, for their own misconduct." *Ibid*, 327. Even the cases cited on the other side, shew that "the master is always liable to third persons for misfeasances and negligences, and omissions of duty of his servant, in all cases *within the scope of his employment.*" But no where is it said, that the wilful act of the agent, *beyond* the scope of his employment, can forfeit the estate of the principal. It is true, that in the city of London case, it was held, "4. That the act of the common council was the act of the corporation;" but the counsel for the State will not, we imagine, cite it as authority. The rule, as stated by Story, is that as a general proposition, "the officers of a bank are held out to the public as having authority to act according to the general usage practice and course of business of such institutions, and that their acts, within the scope of such usage practice and course of business, bind the bank in favor of third persons, having no knowledge to the contrary." P. 103. So it was said by C. J. Parson: "The directors are the agents of the company; the officers are its servants. The duties of both are pointed out by statute, or presented in the bye-laws, which are the promulgated will of the company. *Acting within the authority thus given*, the company is liable for their acts, but *beyond these limits they cannot bind the principals.*" 17 Mass. 29. 14 *ib.* 58. Is suspension, then, an act within the scope of the directors' power? Does the letter of attorney give them this authority? It certainly does not. Besides, the case of Smith v. Smith, 3 De Saussure, 557, decides the principle of the present case. There the court held, that the directors or agents of a company could not surrender the charter without the assent of the ma-

jority of its members—because it was not within the scope of their employment. In the present, as well as in that case, it is a question of authority. In neither, can it be said that the agents are the principals—the directors are the corporation.

But then it is argued that there is "a distinction between a surrender, which derives its effect from the authority of the agent to make it, and a forfeiture or other penalty incurred by the neglect or refusal of the agent to perform a duty enjoined by the charter." Certainly no such distinction can be found in the books, as that implied in these words. On the contrary, whether it be an act of commission or omission, the question of authority is always involved. The principal is held liable for the refusal or neglect of the agent, because the law raises the presumption *in favor of third persons, having no knowledge to the contrary*, that as the act was within the scope of his employment, he was authorized by his principal to neglect or refuse. Story, 103. But the cases cited, only prove that the corporation is liable *in damages*—not to forfeiture of charter. Is it in *every* instance, that a director or agent fails to perform a duty enjoined, that the charter is forfeited—will the mistake—the ignorance or the wilful refusal of an agent, to do his duty, bring down upon the stockholders a forfeiture? They may very justly be subjected to a loss of money for such causes, but surely not to loss of charter. There must be some distinction between the acts which will work the loss of money and the loss of a charter; and it seems to be this: the corporation is liable *in damages* for every act of misfeasance or omission of its agents, and to the penalty of forfeiture, when the corporation itself "pursues such measures as wholly frustrate the end and design for which it was created. So Mr. J. Woodworth, in 6 Cowen, 219, cited by the Attorney General, "the defendant (the corporation,) assigned so much of their property as to render themselves incapable of continuing their operations. This fact, if conceded, presents a case falling within the general principle laid down in Slee v. Bloom, 19 Johns. 546, that *suffering* an act to be done which destroys the end and design for which the corporation was instituted, must be regarded as equivalent to a direct surrender." But before the corporation can be said to *suffer* an act to be done, it must have the opportunity to prevent it. So in the present case, before the acts of the agents can become the acts of the corporation,

it must acquiesce—must authorize it, either before or after the fact. It must suffer—permit—authorize—the omission or neglect. And very little consideration will suggest cogent reasons to prove that justice requires the acknowledgment of this distinction. Suppose, in the case of the Bank of Hudson, that the directors had, without consideration, or fraudulently transferred so much of the property of the bank, as to render it incapable of continuing its operations. Surely, the stockholders could have had the conveyance set aside, by a Court of Equity, yet if the act of the agent is always the act of the corporation, this transfer, although fraudulent, would have been a surrender of the charter—and the stockholders, being then no corporation, could not have recovered their property. In other words, the directors, by a fraud upon their principals, could have transferred the property to a third person without consideration, and the consequent dissolution would prevent its recovery. The true rule on this point is laid down in Slee and Blum, if the corporation *suffers* an act to be done which destroys the end and design of its creation, the charter is forfeited. It implies that *all* the acts of the directors are not obligatory upon the corporation, but that they may become so, by its adoption of them. The case of Smith v. Smith, and that of Slee v. Blum, are, in principle the same; in the first, a surrender, strictly so called, was made; and in the latter, an act was done, which, in the language of the court, "must be regarded as equivalent to a direct surrender." But, in the former case, the corporation *did not* acquiesce or suffer it, and the surrender was void; and in the latter, *it did;* and the surrender was decided to be valid. Thus, like every other principal, a corporation is bound for the acts of its agent, done within the scope of his authority; and this authority may be given either before or after the act of commission or omission. But, in order to bind a corporation it must be shewn, when any thing has been done beyond the plain authority delegated, that the corporation has done some act, significative of approbation or adoption. Prin. and Ag. Theobald, 303. To apply this principle to suspension, if the misuser by the directors had been *previously* authorized, or had *subsequently* been adopted by the corporation, it would have been bound to answer for it. While, therefore, the corporation is rightly held liable to pay money for the neglect of its agent to do his ordinary duty, it would be manifestly

unjust to inflict forfeiture without the corporation having *suffered* or adopted such a course of measures, as defeat the end and design of its creation. The State will have every necessary security, if it be decided, that to forfeit a charter the stockholders must have authorized previously or subsequently the misuser of the franchises. That the directors have not the power to bind the corporation in all cases, is manifest, not only from these general principles, but from decided cases. 14 Johns. 118. 2 Johns. 109. In 2 Cranch, 166, the court said, that an act not performed pursuant to the requisites of the act of incorporation, cannot be considered an act of the company. So a promise, by directors, to pay money, for which the corporation had received no compensation, could not bind it. *If they promise more than they are authorized, they may be personally answerable; but cannot pledge their principals.* 17 Mass. 29. And it will scarcely be contended, that they can, by exceeding their powers, destroy the corporation, when they cannot do, what is a less important act, bind it to pay money. The same principle has been acknowledged, too, by our own courts, in the case of Jarvis v. Pinckney, *et al.*, Riley's Cases, 123. Mr. Justice Richardson there said: "The main question was, whether the Council, from whom the defendants derived their authority, can justify the act. The powers of council are limited." So, Mr. Justice De Saussure: "They (the City Council,) acted beyond their powers." If the Council had no authority to order the act, their agents could not justify; hence, in that case, the defendants were mulcted. So, Mr. Justice Harper, 2 Hill, 576. I have little doubt, that if a public corporation, in bad faith, should authorize or direct the commission of an unlawful act, the individual members, who voted for the measure, would be personally liable. It would be unjust, that the whole corporation should be liable, or the members who opposed it. And such was the argument of Treby, for the city of London. "The particular members that commit the unlawful act, and all that act under their authority, are subject to the same law as all other the king's subjects. And, therefore, this reason, that else (and here he anticipates our Attorney General,) there will be no punishment upon them adequate to the offence, and consequently a mischief and inconvenience is but a shadow, and nothing proportionable to the mischiefs and inconveniences attending the position of a forfeiture, of the other side.

Such, too, was the intention of the legislature, for it is provided in the 7th section of the charter, that the corporation shall not deal in certain articles; and by the 9th, if the corporation, or any person for its use, violate the 7th section, the person or persons giving the order, and their agents, shall forfeit, &c. Here is a plain construction of the charter, shewing, that even if the corporatiion violate an *express* provision, that the agents ordering or doing the act shall be punished. The principle pervades the whole law of agency. Upon what principle, then, can suspension, which is alleged to be an illegal act, done wilfully, in violation of the letter of attorney, and out of the scope of their employment, be held a cause of forfeiture? It is the act of the individuals who concurred in it, and they, and they alone, ought, in justice, to be punished—not the innocent minority, who have opposed it, nor the innocent stockholders, who were never consulted. And where is the danger of corporations becoming masters of the law, and changing the character of our institutions? It is, as said by Treby, "*a shadow.*" If the State cannot do justice upon a bodyless corporation, it certainly may upon its agents. But the contrary proposition leads to "most preposterous conclusions." It authorizes the directors at any time, against the will of their principals, to sacrifice their property. For the motive of the act cannot be considered, and, as was decided in the city of London case, "the acts of the common council are the acts of the corporation." What would hinder them from incurring forfeiture in order to indulge the legislature in its present disposition to take away the charter? Is it not unreasonable, as well as against law, to suppose that they possess this power—which can serve no good purpose, public or private, and is liable to the greatest abuse? Then it is said that the stockholders have acquiesced, and might have prevented this suit, by disavowing the acts of their agents. This is pregnant with an important mistake, that requires correction. The first intimation received by the stockholders, that suspension was regarded by the State as a cause of forfeiture, was when the act of 1840 was passed. By it, the alternative was offered them, either to accept the proposed amendments of their charter, or to lose it by judicial proceedings. They were not called upon to disavow the acts of their agents. No opportunity to deny the right of the directors to suspend, was given. They were required to submit by a certain day

to the conditions imposed. We put it to the candor of gentlemen to say, whether, until the present argument, it was ever intimated that a disavowal by the stockholders of the acts of their agents, would satisfy the State, and prevent suit. Certainly, I never heard of any such intimation. And the *scire facias* contains no such allegation, but, on the contrary, states that the *president and directors* resolved, and did suspend, and that the *stockholders* refused and neglected to attend a meeting, *called to disavow the acts of their agents*? No—to accept the provisions of the act of 1840.

9. Let us proceed now to enquire what was the end and design of granting this charter. "The object in creating a corporation is to gain the union, contribution, and assistance, of several persons for the successful promotion of some design of general utility, though the corporation may, at the same time, be established for the advantage of those who are members of it." Angel and Ames, 8. Introduction. There are two objects in view, then, public utility, and private emolument. It never can be imagined, that the legislature did not agree that the stockholders should make a reasonable profit on their capital.* To learn, therefore, the obligations of both parties, we must keep them both always before us. The charter of the Bank of South Carolina comprehends three different classes of business. 1st. That belonging to a Bank of deposits. 2d. Of a bank of discount. 3d. Of a bank of circulation or issues. And, first, as to a bank of discounts. This is an institution established solely for the purpose of keeping coin and bullion of individuals, and of facilitating mercantile payments, by the transfer upon its books by checks or drafts of the amounts due depositors. Raguet on Banking, p. 68.† Nothing can be more useful to a community, than such an institution; but to maintain it, a fund must be provided by government or individuals to defray its expenses, inasmuch as no number of persons would assume the responsibility of taking care of other people's money, and of keeping their accounts, without compensation. It will be recollected, too, that such a bank cannot lend out its deposits.

* 1 Blackford, 267.

† We quote nearly altogether from this author, whose known hostility to suspensions, large experience and general accordance with the view of the democratic party, have secured to him its approbation and confidence.

From such a bank the stockholders would derive no emolument, but, in fact, suffer loss. It is, however, of great utility to the State; so that, as to this, the State is the only one benefited. 2dly. A bank of discounts. This possessing capital in money, discounts mercantile paper, the bills and notes of merchants, but does not lend out its own paper. Indeed, it cannot issue any paper. But as the proprietors of such an institution, can derive no more benefit from such a business than any individual, it would scarcely be worth while for a company to be formed, who would pay the rent of a house—the salary of officers, &c.—to do what they could do much cheaper, individually, or by means of a broker. The expence of a company would be a dead loss. Still the community would derive great advantage from an institution which would "facilitate loans of money." These two institutions might too be united; which would increase the benefits to the public, and the loss to the individuals. In this country, however, and in the charter of the Bank of South Carolina, these two institutions are joined with a third—a bank of issues. This is added, in order to induce capitalists to engage in banking business. Their object is to lend only credit, and the more capital it possesses, the less is the profit. Credit, not capital, is all that such a bank has, or pretends to have. So far, therefore, as this bank is concerned, the only object it had in view, in obtaining a charter, is to possess the right to lend its credit—to issue its notes. To obtain this right it undertakes to do two other species of business, to wit, that of a bank of discount, and that of a bank of deposite, so far as it relates to the keeping of cash accounts with individuals, and transfers of credits on their books, but not that part which guarantees the safe keeping of the coin and bullion of depositors, except in the few cases where an agreement for a special deposit is made, (Raguet, p. 72,) from neither of which, it can derive any profit—certainly, so small a profit, that no capitalists in this country have ever sought a charter for such a bank. While, therefore, the proprietors derived benefit only from one, the State derived it from all three of them. It is true, that our banks lend out their deposites, but that is the consequence of being *banks of circulation or issues.* If they were not, the capital they loaned would cost them as much to get it, as they would receive for its use. To this, add their expences, and it would be an unprofitable

business. Presuming that the legislature intended some benefit to the stockholders, let us consider the mode of business of a bank of circulation. If such a bank had, at its commencement, a million of silver dollars, and issued paper to the amount of only one million, it is evident that it could make no profit, for the interest of one million of specie in its vaults would be equal to the interest received on one million of paper in circulation. To make profit, therefore, it must issue more paper than it has specie—which may be done, either by retaining the one million of specie and increasing the paper in circulation, or diminishing the specie and retaining the same amount of paper in circulation, &c. In other words, the paper in circulation must exceed the specie in hand. No possible mode can be suggested, by which a bank of circulation may make profit, than by having a greater amount of paper in circulation, than of specie in its vaults. Now, whatever may be the excess of paper over specie, whether two or three of paper to one of specie, it is manifest, that whilst those relative proportions between paper and specie exist, the bank cannot redeem its paper, promptly, on demand. In other words, they are not immediately convertible into specie, at all times, on demand. If, therefore, it be certain, that the legislature intended that the bank should make profit for its stockholders—and is certain that this cannot be done without an excess of paper over specie—and in that case, the paper is not immediately convertible, at all times, into specie, it follows that the legislature intended that the bills and notes should not be immediately convertible, at all times, into specie.

Such, too, is the necessary inference from the 5th clause of the 6th section of the charter, whereby it is declared to be a fundamental rule, that "the total amount of the debts which (the said corporation,) shall, at any time, respectively owe, whether by bond, bill, or note, or other contract, shall not exceed three times the amount of its capital, (over and and above the moneys then actually deposited in the bank for safe keeping,") &c. Unquestionably the proportion of three to one was selected in pursuance of the opinions of political economists. Such is the exact proportion stated by Adam Smith. The legislature thought that it would be safe and prudent management to issue three of paper to one of silver. Yet, it is certain, that if such an excess of paper over specie is made, the bills are not, at all times, immediately converti-

ble into specie. To grant such a privilege, and then to punish its use, is inconsistent with our notions of good faith and justice. But it is said that this is not a permission to issue to that amount, but a restriction of issues beyond that amount. Now, we admit, that to exceed that limit—three of paper for one of capital—is a breach of the franchise. Yet, it is not easy to see the difference between a permission to issue three to one, and a restriction not to issue more than three to one. Take, for instance, and illustration—the gaol bound act—by which the defendant in execution is restricted to the district of Charleston; is not that substantially a permission to use the whole district—or the old sumptuary law, limiting an individual of a certain rank to a certain number of dishes, was not that a permission to use that number of dishes? In fact, restriction and permission are here co-relative words—the one permits you to go to a certain distance, the other restrains you from going beyond it; in both, the stopping place is the same.

Then, it is replied, the argument proves too much—"it proves that you are not bound to pay all;" not so; it only proves that bills and notes are intended to be, at all times, not *immediately*, but *ultimately*, redeemable in coin. For, in case the excess of paper over silver be greater than three to one, the directors are personally liable to the creditors; and in case of failure of the bank, its whole property, and the property of the stockholders, to twice the amount of their stock, are bound for the ultimate payment of the debts of the corporation. The creditors, therefore, are well secured. This elaborate care, too, to prevent the probability of ultimate loss by the creditors of the bank, and the entire absence of any express obligation to pay specie, clearly indicates that the former was the main object of the legislature. It will be observed, also, that the property of the directors is only liable, in case more than three of paper to one of specie is issued; if three to one, and no more nor less than three to one, are issued, they are not responsible as directors. Now, as the whole management of the bank is in their hands, against them, ought to be provided the surest and severest checks. To restrain improvident management, the proportion of three to one was adopted; that far, it was thought they could go with safety. So long as they did not exceed it, no penalty is incurred. Yet if the directors should issue paper to three

to one—which they certainly can do, with personal impunity, it is manifest that the paper is not immediately, and at all times, convertible into gold and silver, current legal coin. Surely, if immediate convertibility is the condition, they, by whose act it is defeated, should suffer more than the innocent stockholders. This seems to have been the reason, too, that the legislature imposed a penalty upon the direction in case of an excess. If they exceed the proportion, supposed to be consistent with prudent management, they are personally liable, but if even *insolvency*, from any other cause, happens, they are not liable to a greater extent than the stockholders. With what reason, then, can it be said, that immediate convertibility, at all times, into specie, is the condition of the charter?

It must be recollected, that we are not engaged in sketching a perfect system of banking, nor even defending the present; our business is simply to construe the charter of the Bank of South Carolina, in order to discover whether or not a failure to pay specie, is a forfeiture. We think that we have very clearly shewn, that from the nature of the charter, it was not intended that an inability to pay the bills and notes of the bank promptly and immediately, in gold and silver, on demand, should be a cause of forfeiture.

The proposition advocated by the counsel for the State is, that this immediate convertibility of paper into gold and silver, legal current coin, upon demand, at all times, and under all circumstances, is the tacit and implied condition of the grant. To be prepared to meet all "occasional demands," (Adam Smith, 141,) all "probable demands" (Raguet, 70,) is not sufficient; but they must be ready in times of panic—of general suspension—at all times to pay specie. The penalty of being unable to meet "extraordinary and irregular demands, having no reference to the quantity of paper in circulation, or unto the credit or solvency of the banks on whom such demands are made,"* is forfeiture. It will be observed, that to prevent a forfeiture, it would not be sufficient to shew, that the bills and notes, &c., were amply secured, by the possession by the bank of gold and silver in bullion—or by lands—by negroes—or even the stock of the State itself. Nothing

but "gold and silver, legal current coin," is sufficient. Such is the condition, say the counsel, of the bond; and its performance cannot be excused. To sustain this doctrine, it is said that the charter constitutes this bank, a bank of circulation, thereby implying that the object of such an institution, so far as the State is concerned, is to preserve prompt and immediate convertibility. Its bills are said to be circulating medium, or currency, of which immediate convertibility is the essential characteristic. It will scarcely be denied, that the legislature knew the nature of such a bank; and intended that it should subserve those public ends for which alone it is fit. The private objects we have already considered, now the public object. "*Banks of circulation are only beneficial to a country when they occasion the exportation of coin.*" Raguet, p. 78. It is by the substitution of a cheap for an expensive currency, that they confer benefit upon the country. So far, therefore, as the public objects are alone considered, the greater the quantity of coin they occasion to be exported, the greater the benefit to the country. The exportation of coin being the only benefit to the country, that must have been the object which the legislature intended to gain. So far as the State is concerned, therefore, to keep coin in their vaults, is a violation of their duty. When it exports coin, it is doing its legitimate business—accomplishing the purposes for which it was intended. But it is clear, that if it exports the coin, it cannot redeem its paper. In order to be able at all times to convert paper into coin, it must possess the coin, which it cannot do, without depriving the State of the only public benefit which can flow from its creation, to wit, the exportation of coin. So, also, it is impossible to suppose, that paper issued by a bank of circulation, can be immediately convertible. To keep notes convertible, there must be a fund of specie, and to keep a fund of specie, is not the purpose of a bank of circulation. So far, therefore, as the argument of the counsel for the State depends upon the fact, that the charter constitutes this bank a bank of circulation, it is, certainly fallacious. As to the cases cited, they do not confirm the position maintained by the counsel for the State. Nobody denies that bank notes do circulate, and are, in vulgar parlance, termed *money*, but they are not *legal* money—they want the characteristic of money—that of being a *legal tender*. To say that bank bills are legal tender, "*if not spe-*

cially excepted to,"* is idle; it is to say, that the creditor may accept them if he pleases; so may he accept old newspapers. "Bank paper, like checks and negotiable notes, circulates entirely upon private credit, and is not a coercive circulation. It is at every person's option to receive it or reject it." 1 Kent, 408.

The constitution has declared, that only gold and silver should be legal tender—because they approximate nearest to a fixed and unchangeable measure of value. Paper is more fluctuating in value, and, therefore, not so good a measure. If it were as good a measure—if it could be made so—then it ought, and, no doubt, would have been made legal tender, because thereby the whole interest and expence of wear, of coinage, &c., which are annually lost to the country, by keeping specie, could have been saved. Yet, notwithstanding, it must be admitted that paper is, in its nature, incapable of being even a good measure of value; much less, as good as specie, it is contended, that it must not vary in value—that banks must take away from it its inherent defect, and render it what specie itself is not, unchangeable in value. No legislation has ever been able to keep even specie, much less can it make paper, a perfect measure of value. But it is said, that the idea, that specie may appreciate or rise in value, and thereby render the demand for it so great, as to produce runs on banks, suspensions, &c., without blame on the part of the banks, is mere speculation—the "idle imaginings" of theorists—such, of course, as Adam Smith, M'Cullock, Ricardo, Raguet—*Et hoc omne genus*—with which our courts have nothing to do. That judges of law are not set up in high places to become advocates of theories, we all know, and the defendant, particularly, deprecates such an event; but to determine that suspension is a cause of forfeiture, is most certainly to adopt a theory. It would be a decision by judges of law, that the only sound currency is one convertible immediately, on demand, into specie. To establish a forfeiture, it is argued, that the end and design of the legislature was to create a sound currency—that the essential characteristic of a sound currency is its immediate convertibility into gold and silver—that suspensions destroy this soundness or convertibility. Is not this a theory concerning the currency? And it is submitted, with great defe-

* 10 Wheat. 333.

rence, to the court, that your Honors are as little capable of deciding this question rightly, as the Congress of the United States, or any other body of intelligent gentlemen. The legislature of 1801 may be admitted to have intended to create a sound currency, but what they meant by a sound currency, may not be the same as that which the legislature of 1840 understood by the same phrase. We must look to the opinions of men of those days—to their writings—to usage—to determine what was then meant by a sound currency; otherwise the contracts of to-day, having reference to opinions, usage, &c., now prevailing, will not be contracts a few years hence; and these opinions, and these usages, have always been received by courts, in explanation of contracts. When terms are used, which are understood by a particular class, in a certain and peculiar sense, evidence to prove it is always admissible. So mercantile instruments are expounded according to the usages of merchants; and, in many instances, even to annex incidents to the terms of written instruments. See 3 Starkie, 1033. It is not reasonable to suppose that the legislature, in granting this charter, had no reference to the opinions of those men who had devoted years to the study of political economy, and acquired a reputation as wide as the world, by illustrating its principles. The very words, bank, banks of deposite, discount, circulation, circulating medium, currency, specie, are all words, technical words of the political economists. In what sense they are properly used, must be learnt from their writings, whence they have gradually been adopted into our law books. Their opinions, too, have become, since the origin of their science, parts of the laws of this country, as well as of England and France. It is a matter of history, that they have changed the policy of modern nations. Ought not the court, then, to regard their opinions? Can it know what was the contract between the State and the bank, without regarding the opinions prevalent at that time? In deprecating reference to theories, started *since* the grant of this charter, we are justified by the well established rule of construing ancient instruments by the usages prevalent at its formation. To construe them by modern usages—by modern opinions—which, however just in themselves, did not enter into the consideration of the parties at the time of the grant, would be most manifest injustice.

But, then, it is said, that although the bank is allowed to issue

three dollars of paper for one of specie, still it is upon condition, that it is, at all times, ready, *on demand*, to redeem its notes with legal current coin. Then it matters not, whether the bank has a dollar of specie, or any thing else, to meet its notes; if there is no demand, there is no cause of forfeiture. The demand is the true test. To refuse, on demand, is a cause of forfeiture. Like the Bank of Indiana, it may have $373,000 in circulation, and thirty-one dollars in specie, and if no demand is made, the bank has not forfeited its charter. This, certainly, was not the opinion of the court in the Indiana case, for the judge therein states, that if the bank had even issued more paper than it had specie, but without fraudulent intent, and demand was made, which it was unable to meet, that this would not have been, of itself, a breach of the charter. P. 151. The bank lost its charter, not for refusing a demand, but for fraud. So, "the refusal to pay, unless arising from continued insolvency, is, in my apprehension, no cause of forfeiture. As to suspending operations, that may, in some cases, be a prudent and justifiable measure, and consistent with the ultimate solvency of the bank;" and the latter remark is confirmed by the fact, that although all of our banks suspended, none of them, either at the time, or since, have been ever suspected of insolvency. 6 Cowen, 216, cited by Attorney General. So, in the Pennsylvania case, these passages are cited with approbation. These three decisions, therefore, directly contradict the assertion, that a refusal to pay on demand is cause of forfeiture. It cannot, therefore, be the implied condition. But is not the object of requiring paper to be immediately convertible, the preservation of a sound or solvent currency? Yet it is manifest, that the demand is not the true test of solvency, for this is produced as often by other causes as by apprehension of insolvency. A bank may exist for years, as did the Bank of Indiana, or the Bank of Amsterdam, which was solely a bank for the deposit of specie, without having one dollar in specie, or any thing else, and being, in the meantime, totally insolvent, and there may be no demand. But let us consider, too, the consequences to which this proposition leads. Suppose one million of dollars necessary for the circulation of Charleston, and the Bank of the State of South Carolina to issue $143,000, having, at the same time, $100,000 of specie in its vaults, and each of the other six banks to issue $200,000,

having no specie at all, but good paper. In this case, so far as specie is a test, the Bank of the State has been the best managed, and is the only solvent bank. Now an over issue always produces a run or demand for specie, and if, in the case supposed, the demand fall upon the Bank of the State, she must soon be compelled to suspend. In this case, she would suffer for the mismanagement of the other banks. But suppose that these seven banks issue no more than one million, and have among them $500,000 of specie; now if the banks of the union over issue, and New York suspend, our banks unquestionably will have demands made upon them, and although their management has been prudent, and could not have led to any evil, yet they would be compelled to refuse the demand, which is said to be a cause of forfeiture. In other words, the principle contended for would make our banks responsible, not only for their own mismanagement, but for that of the other banks of the union. But if the demand be made upon our home banks, and it is met, the specie will be exhausted, and then their doors must be closed. For what purpose? Does it benefit our own people? Does it secure the property of our own citizens? Is the honor and credit of the State maintained abroad, by making our banks bankrupts at home? Bank directors may be presumed to have as much sagacity as ordinary persons, but it is impossible that they can foresee every possible event. The suspension of 1837 came upon the country suddenly, and, as it has been said, spread as much astonishment as a clap of thunder from a cloudless sky; that issue of paper, which on one day was sufficient, on the next appeared to be super-abundant. And it was impossible, in the interval, to have reduced the issues—issues, which, so far as our own community was concerned, were not more than sufficient, though taken in connection with the issues of other States, were, perhaps, too great for the country. Is a refusal, then, to meet a demand so caused, in justice, or in law, a good cause of forfeiture? For the law, we refer to the cases cited by the counsel for the State, and, in justice, our banks cannot be held answerable for any but their own mismanagement.

And here I will briefly notice several points, to which great importance has been attached by the counsel. It is said that suspensions pervert the great public objects of the charter, and these are said to be loans, and discounts, and deposites. P. 104. And,

first, as to loans and discounts. It is asserted, that the object of the charter, in reference to these "was to facilitate the obtaining loans of *money*, at lawful interest." The charter contains no such provision, nor is there any grounds for such an inference. On the contrary, it authorizes the issuing of bills and notes, "promising the payment of money." Is a promise to pay money, money? or is it not an evidence of debt like a negotiable note? A suspension, then, is a refusal to lend any more promises to pay money—to contract any greater debt—not to lend money, for the bank never had any thing else to lend but its credit. And it is admitted, subsequently, p. 108, that the bank is not bound to issue bills, unless the "time, amount, person, and security," suit the directors. A refusal to make loans of paper is not, therefore, a cause of forfeiture, unless, indeed, the bank should, like the copper mine company, continue for a series of years not to use its charter. Such an abandonment of its rights would entitle the State to dissolve the corporation.

But then it is said, that though it may not be a nonuser to refuse to lend bills, &c., yet if these bills are loaned, it is taking usury. To establish this assertion, it must appear that the *bank* has taken more than at the rate of six per cent. per annum. Suppose a merchant gives his promise to pay to the bank, and receives, in return, its promises to pay, and that the notes of the bank are worth in market five per cent. less than their nominal value; then it must be enquired what is the note of the merchant worth? Is his note worth, in gold and silver, the amount represented by it? Can he get a dollar of specie for his dollar of paper? Surely not—his note will not, at any time, serve for a foreign remittance; nor will the butcher, the baker, or any body else, even in time of suspension, receive it as readily as a bank note. In what respect, then, is the note of this merchant more valuable than the note of the bank? Before the bank can be said to take usury, it must be shewn that the merchant gave more than legal value for the bank bills. It is of the last importance, therefore, to determine what is the value of his note—is it worth five or twenty-five per cent. less than specie? Again, a merchant discounts a note for one thousand dollars, and receives one thousand dollars in bills, of the denomination of ten dollars, and for his interest or discount, for sixty days, he returns the bank one of

these ten dollar bills. He then has borrowed a thousand dollars of paper, worth five per cent. less than their nominal value, and he pays his interest with a ten dollar bill of paper, worth five per cent. less than a nominal value. He would pay usurious interest, if he gave ten dollars in specie, or its equivalent, but not if he pays in paper. It is true, the merchant's note promises to pay in specie, and so does the bank, and both may be sued, and the specie obtained. It is clear, that the merchant does not pay usurious interest *to the bank*, although he may pay it after his discount, *to some other trader who sells specie, or its equivalent.* The difference between paying usurious interest to the bank and to some other person, has thus been wholly overlooked. And we may add this remark, that whether the bank be in a state of suspension or not, neither their bills, nor the bills of any individual, can purchase specie dollar for dollar—a premium is always paid. But to return to the point. The cases cited—1 Peters, 43, 2 Peters, 527, are, unquestionably, not in a point. In the first case, post notes were given for the note of an individual, indorsed by the defendant; these post notes were not payable until after the note was due; the bank took by their loan of depreciated paper about eighteen per cent. from the maker. The indorser was required to pay this note, not in depreciated paper, but in gold and silver, or its equivalent. *The contract was, that the maker should receive depreciated paper, as if it were not depreciated, and pay in gold and silver, or what is the same thing, in depreciated paper, at its specie value.* So in the next case, the U. S. Bank discounted a note, and loaned the bills of *another* bank forty-six per cent. below par. The contract was, that the borrower should take these notes at the *nominal value of the bill*, and re-pay the bank in *specie, or its equivalent.* By this transaction the bank would have made over sixty per cent. per annum. Neither of these cases, therefore, has the most remote analogy to the present. The defendant loaned paper, which was, for ordinary purposes, equal to specie, but not convertible into specie—received its payments, of *principal and interest, in depreciated paper*, at their *nominal*, not the real value, and made by the transaction no more than six per cent. per annum. If the borrower of the bank notes lost money, it was not gained by the bank. The traders of the community—the lenders of specie—not the banks, may have re-

ceived usury. It would have been different, if, as in the cases above considered, the bank had loaned depreciated paper and received payment in gold and silver, or its equivalent. It is, therefore "manifest that he was not charged by the bank, as it has been alleged," (p. 106,) with a discount of from four to six per cent. for sixty days. Then it is said, that a bank which pays out its own bills and refuses to redeem them, makes no loan (of money?) at all, but, in effect, charges a discount merely for becoming a surety upon a note discounted. And it is alleged, that this is an illegal act. *Ibid.* Now, it is unquestionably true, that a bank has nothing to lend but its credit—money, *i. e.*, gold and silver, could not be loaned with profit. It lends to the merchant, for his note, or credit, its notes or credit, and the latter will be taken readily, where the former would be refused. The profit of the bank is derived from the loan of its credit, and for the use of it the merchant pays one per cent. for sixty days. "The operation is then precisely the same with that frequently performed by moneyed men, of indorsing notes for a commission." Is this an illegal act? Certainly, no case can be found in which such an assertion is maintained. Is a *del credere* commission unlawful? Almost every consignee of foreign goods sells for a commission, *del credere*—that is, guarantees to the consignor—indorses the solvency of the buyer. So, when a bank discounts a bill of exchange, it re-sells it, and charges a commission for its indorsement—for pledging its own credit. Is this an illegal act? In substance, as it has been said by the counsel, the operations are the same, and are legal. The powers granted by the charter can only be used in that way. The profit which the bank receives for lending its credit to the merchant, is fixed by the charter at one per cent. for sixty days, but the moneyed man may take as much as he can extort from the necessities of the community. It is very clear, therefore, that the counsel have too hastily concluded that the bank takes usury by lending its bills in time of suspension, and it is equally clear, that, substantially, all banks of circulation do nothing more, *at any time*, than make a profit by indorsing for a commission.

And as to deposits. The argument of the counsel assumes a fact, which is directly contradicted by experience. Deposits of money, to wit, gold and silver, if intended for safe keeping, are

special, and it cannot be pretended that the bank has refused to re-deliver them, and they do not guarantee the safe keeping of the bullion and coin of depositors, except in the few cases where an agreement for a special deposit is made. Raguet, p. 72. But, in fact, deposits are generally made in bank bills. The case in 2 Peters, 318, does not decide that a bank is bound to pay all its deposits of bills, whether made in the bills of the bank, or *other banks*, in specie, but that in the particular case before the court, the bank was bound to pay *its own bills*, which was the deposits, in specie. The reasons given are, that "the certificate is expressive of a general, not a special deposit, and the act of incorporation, sect. 17, is express, that the *bills of the bank* are redeemable in gold and silver." Now a refusal to pay the deposite of its own bills in specie, does not differ in fact from a refusal to pay the note when presented. The argument of the counsel, therefore, on this point has been already answered, in the consideration of the refusal to pay its issues. It may be added, that the assertion, that banks draw into their vaults all the specie of the country, is entirely unfounded. For, as Mr. Raguet remarks, "the operations of a bank of issue cause the exportation of specie; the effect of an issue of paper is to drive the specie out of the country. Now, therefore, is it true that the bills of banks are really certificates of actual deposits of cash?"

Another argument used in favor of the proposition, that immediate convertibility, on demand, is the condition of the charter, is, that this bank was intended by the legislature to be based upon specie. It is said that this State had, from its infancy, groaned under the evils of a currency, based upon credit, an inconvertible currency; that to remedy this, this bank, which had exhibited, practically, for ten years, as an unincorporated company, the advantages of a currency, based upon specie, was granted a charter. Unquestionably, the best security for the good management of a bank, or any other company or partnership, is the individual liability of the shareholders. In Massachusetts, until 1828, the stockholders of all corporations were held personally responsible, and the tendency of legislation, and of judicial decisions, in many States now, is to increase the personal responsibility of individual stockholders in corporate institutions. 2 Kent, 273, n. So long as this bank was *unincorporated*, the legislature had the best pos-

sible security for the payment of specie. And here the counsel for the State agree with me, for they say, "the personal responsibility of private bankers affords, not only a surer preventive than the forfeiture of a charter against any suspension of specie payments by them," &c., &c. Now it is not very manifest how the surrender of the *best means* for the attainment of any object for others *less good*, proves that the legislature intended *more perfectly* to secure that object. If it was intended to put the payment of specie out of all danger, the best means was individual responsibility. Why, then, did they surrender it? Why did they limit responsibility? To limit responsibility, was to remove the surest preventive of bad management—of over issues—speculation—and all those evils which have vexed the country since the creation of joint stock banks. Consider, too, that while taking away unlimited responsibility, which necessarily increased the danger of suspension, no clause was inserted in the charter regulating the payment of specie, nor making its neglect a cause of forfeiture. The legislature cannot, therefore, be presumed to have incorporated this bank in order to secure "the prompt convertibility of paper into specie." Again, it is said, that this is obvious from the provisions of the charter. Certainly there is no express obligation of that sort; and a little consideration will shew, that the act of 1814 does not help the argument. In the first place, the act contains a proviso, that nothing in it shall affect the rights of any bank previously incorporated, and, therefore includes the Bank of South Carolina. So that the act cannot be considered a rule of construction as to the original charter of this bank. And the act of 1822, which renewed the charter, and was subsequent to the act of 1814, re-grants all the "privileges, &c., which they now enjoy under their charters," and makes it "subject to all the restrictions imposed by the said charters." *This act was passed, too, a year before the expiration of the original charter.* So, the act of 1832 renews the charter, as it was *originally* granted. It is clear, therefore, that not only by the charters, but by the act of 1814, itself, that it has no application to the Bank of South Carolina. Moreover, if the legislature have a right to pass an act, construing a previous charter, why may they not construe it away altogether? The charter is to be construed from itself—the rights and duties of both parties are to be learnt from its pro-

visions, and not from any acts of the legislature. It is no proof, therefore, that the bills of the bank were intended to be a circulating medium, convertible on demand into specie, to cite the act of 1814. If they were not by the original charter, they are not so by a clause which expressly declares that its provisions shall *not* affect any charter previously granted; and the renewals all *expressly* declare, that the bank holds its *original* charter unchanged. Moreover, upon reference to the act, it will be seen that the construction given to it by the counsel for the State is erroneous. By the first and second sections, the Bank of the State of South Carolina is authorized to make and issue bills of a less denomination than one dollar; by the third, every other body politic is forbidden to issue bills of credit in the nature of a circulating medium, or for other purposes than that of contract, saving the rights of chartered corporations; and by the fourth, the City Council is directed to call in, before a certain day, the bills of credit issued by them in the nature of a circulating medium. Why was this act passed? What was the evil to be remedied, or the good to be effected? These questions will be answered by reading the report of the President of the Bank of the State of South Carolina, for the year 1813. He states, "that an opinion had been expressed that the repealing clause in our charter, (that of the Bank of the State of South Carolina,) has removed the prohibition of issuing bills of small denominations;" that "this privilege is of great importance *to* our institution;" and desires the legislature to grant this privilege *exclusively* to the bank, if it did not "infringe the privileges of any chartered corporation." The act of 1814 is manifestly in pursuance of these recommendations. Now was this act intended to alter the nature of bills of credit, as they stood previous to it? Certainly not as to the chartered corporations. Was it to make them immediately convertible, on demand, into gold and silver coin? The object manifestly was to give the exclusive privilege—a monopoly—to the Bank of the State, of issuing "shin plasters"—bills of "small and mean" denominations—and not to alter the rights of chartered institutions.

If any inference can be drawn from this act, in reference to the convertibility of paper, it is against it. For, unquestionably, paper will always drive out specie. If these bills, of small and mean denominations, are issued, the silver, *for change*, will soon afte

disappear. Smith, 142. In other words, the whole of the specie in circulation, will be sent abroad; and it then becomes *physically* impossible to redeem paper with coin. If the act was intended, therefore, to affect the convertibility, it was intended to render paper inconvertible, at any time, into gold and silver, legal current coin.

But even supposing that the act was intended to render *bills of credit, in the nature of a circulating medium*, a privilege—a franchise; that does not prove that the issuing of bank bills or notes, are *also* made franchises. For bills of credit, under the constitution of the United States, differ from bank bills.; State v. Billis, 2 M'Cord, 12; and also from bills of credit under our charter—which are bills obligatory or of credit, *under seal*, and are transferrable only by *indorsement*, and not by delivery. This latter class, certainly, has not been misused; for none such were ever used. Again, if the act of 1814 "forms part of the charter," and gives a privilege or franchise to the banks subsequently incorporated, then the act of 1814 could not be repealed, altered, or modified. For it would diminish or impair the value of the privileges or franchises granted to the bank, and, therefore, be a violation of a contract. And their construction will lead them into a further difficulty. For the act of 1814, according to their view, prohibits other corporations from issuing bills of credit, in the nature of a circulating medium; that is, gives the existing banks the *exclusive* right to this privilege. Now, it is clear, that if, at any time, it was a part of the contract, one of the privileges or franchises, exclusively to issue bills, the legislature has, by their grants of charters, subsequently, diminished the value of that privilege—the exclusive right to issue bills—and, therefore, has impaired the obligation of contracts, and violated the constitution of the United States.

Again, it is said, that our construction of the charter would make the bills and notes mere debts. Certainly, and so says the charter. "The total amount of the *debts* which each of the said corporations (for there were two incorporated at the same time,) shall, at any time, owe, whether by bond, bill, note, or other contract, shall not exceed," &c. Here it is expressly said, that the bills, notes, or other contracts, *are debts*. Again, continuing the sentence, "shall not exceed three times the amount of capital,

(over and above the monies actually deposited in the bank for safe keeping,) unless the contracting of any *greater debt* shall have been previously authorized by a law of this State." The bonds, &c., are first stated to be *debts*, and then it proceeds, that the bank shall not contract a *greater debt* without leave of the State. So "bank bills are governed by the same rules which are applicable to negotiable notes and banker's checks." 2 Hill, 509, n. These are mere evidences of debts. In a subsequent clause of the charter, it is declared, that the bills and notes shall be binding in like manner, and with the like force and effect, as upon any private person or persons, if issued by him, her, or them, in his, her, or their natural capacity, or capacities. So that bills and notes are contracts—are debts—and are binding on the corporation, in the same manner as notes of individuals are upon them. Being mere debts, they cannot have been intended, (as is impliedly admitted by the counsel, p. 112,) to have been a circulating medium, or currency, immediately convertible, on demand, into gold and silver, legal current coin.

10. The truth is, that suspensions are unavoidable, and no more imply bad faith, than do the diseases of the human body. This will be made manifest, by briefly reviewing the history of some of the suspensions in England and this country, since 1792. In that year was "the first great destruction of bank paper, occasioned by a contraction of the currency, consequent upon its previous over issues." We shall quote, throughout, from Smith and M'Cullock. In 1797, five years after the previous suspension, happened another. A great demand for coin, to pay the foreign debt of the government existed, in consequence of exchange being against England. "No doubt, however, the ultimate crisis was wholly owing to political causes." Alarms, with respect of invasions, becoming exceedingly prevalent, heavy runs were made upon most of the country banks. Demands for supplies from the Bank of England, poured in upon her, and the Privy Council ordered a suspension of specie payments. In other words, the English government declared that it was unable to pay its debts, immediately on demand, in gold and silver, current legal coin. And so did the State of South Carolina, by the suspension of its own bank, in 1837. Undoubtedly the suspension by the Bank of England was sanctioned

by the government, but it is equally certain, that if this breach of faith to its creditors, as suspension is termed by the counsel for the State, *could have been avoided*, the government never would have permitted it. This suspension, too, does not appear to have been owing to over issues by the Bank of England, or of the country banks. "It did not originate in commercial causes, or in an excess of paper, but in the fears and apprehensions caused by alarms of invasion. It was clear, too, that so long as these alarms continued, no paper, convertible into gold, could continue in circulation. And as the bank was without the means of immediately converting its capital into cash, her downfall, and that of the different country banks, who all depend on her for supplies of bullion in any emergency, would, most probably, have taken place, but for the interference of government." And the author is of opinion, that the government was not only justified, but bound to interfere and protect the bank from the consequences of panic. But if suspension be a breach of faith to the creditors of the bank, it was immoral, dishonest, and inexcusable, to suspend, and the bank ought to have continued to pay out its specie to the last guinea. The government of England cannot claim the right to violate its faith, and this it certainly did, if suspension be a fraud upon creditors. And the State of South Carolina has done itself great dishonor by sanctioning or acquiescing in the suspension of its own bank, if it be, in itself, as alleged by the counsel, immoral and dishonest. A government and its bank are as much bound as individuals and their banks, by the common rules of morality and good faith. The counsel for the State can, therefore, choose either horn of the dilemma, suspension is no breach of faith—no legal fraud—or the State has acted dishonestly.

The suspension of 1797, we have seen, was unavoidable and necessary for the security of England. But in subsequent years, they increased in frequency to such a degree as to excite the attention of the House of Commons. And after mature deliberation, they came to the conclusion, that these evils were attributable to the inherent defects of the system of private banking. P. 499. To remedy these, various schemes have been devised, but private joint stock banks, with the right to issue, have been found, under every check and guard that could be devised, to be weak and vicious. "The truth is, that notwithstanding America has a large

surplus revenue, and no public debt, she has been brought in a period of profound peace through a *vicious banking system*, to the imminent danger of being compelled to submit to the disgrace of national bankruptcy. This shews better than any thing else, the mischief that is sure to result from intrusting the power of making unlimited issues of paper money to a number of hands." 503. And, speaking of the American practice of laying down rules for the publication of returns, the proportion which the issues, &c., should bear to their capitals paid in, &c., &c., to wit, the provisions of the act of 1840, he remarks, that "so far from any improvement of the system, their introduction seems to be the only thing that remains to be done, to eradicate whatever there may be of solidity or principle in our present system." We take the liberty to say, that our author is generally believed to be better informed on this subject, than the legislature of 1840, or even its advisers.

The opinion of Mr. M'Cullock is confirmed also by that of Mr. Albert Gallatin, in his Essay concerning suspensions of specie payments. And his opinion ought to have some weight with the other side, for he is a strenuous advocate for the destruction of the present bank charters. P. 24. He expressly asserts, that suspensions are the necessary and inevitable consequences of inherent defects in our system of banking. P. 21. Such, too, is the opinion of Mr. Elliott, in his report of 1819. Such, too, must have been the opinion of the legislature of 1840, which passed the act to prevent the suspension of specie payments. For, as it is universally admitted, that a suspension in its effects on trade and morals, is most deleterious, and is asserted by the State to be a breach of faith—immoral—dishonest—and renders a bank a swindling, usury-taking shop; the legislature, if suspensions could be avoided, and were not inherent, as honest men, as faithful representatives were bound to forbid it, under any circumstances. Instead of that, they have agreed to permit banks to suspend on condition that they pay the State five per cent. on their issues. We will not suppose that they intended to sanction suspension—legal fraud—usury, &c., in order to participate in dishonest gain. It is certain, that they either considered suspension as unavoidable or avoidable. In the latter case they were bound to prohibit it altogether; in the former, they could submit to necessity, and cut off the in-

ducement to over issue. We are persuaded, that such was the opinion of the legislature, and such, certainly, is the effect of the act.

But the suspension of 1837, in this country, demonstrates the proposition. A peculiar combination of circumstances had conspired in 1836, to produce in England an extraordinary spirit of speculation. And in the United States, the large field opened for enterprise—the free institutions of our country—the energy of our people—all tended to produce an unbounded disposition in all classes to speculate. The young—the old—man, woman, and child—all were seized with the desire of accumulating sudden wealth, to which, too, they were incited by the accidental success of a few individuals. Besides these causes, the foreign debt had been greatly increased, by loans obtained in England, and on the continent, both for State and private corporations. Unfortunately, too, these loans, nominally of money, were, in fact, only of credit. The right to draw bills of exchange was bought, but this did not add one cent to the quantity of precious metals in the United States. The party here, who possessed a credit in England, whether a State, or private person, retailed his bills of exchange to the traders of the community, or discounted them in banks. In either case, it increased the paper circulation. These purchasers remitted them to England, in payment of their debts. Thus the result of these immense borrowings, was simply to involve the people of this country in a debt which they were unable to pay at the appointed times. Besides, the debt was incurred not merely by loans, but by the excess of our imports over our exports, which amounted, in four years, from 1833 to 1836, inclusive, according to the report of Mr. Secretary Woodbury, to Congress, in December, 1840, to the enormous sum of $129,681,397. To this, add our borrowings estimated at over $150,000,000, and with the interest, we have an indebtedness of near $300,000,000. To meet this debt, the amount of specie in the country was estimated by the Secretary at less than $35,000,000. (Am. Almanac, 1843.) At that very time, too, the paper circulation was $149,000,000, so that the specie was insufficient for home use. Whilst this was the relative condition of the two countries, in 1836, the commercial distresses of England commenced, being entirely by reason of the bad management of the country banks. The English creditors,

to sustain themselves, demanded payment of the American debtors, which not being promptly met, their credit rapidly declined. A revulsion took place, which destroyed many of the oldest and wealthiest English houses. On our side, the merchants of New York, the great emporium and market of the country, were the first to feel its effects. She is the creditor of the whole commercial community of the union. Feeling this pressure, she too began to clamor for payment from her debtors, and the consequences were, as might have been expected. No further English credits being obtainable, specie must be sent to pay the debt of the country; and it was not to be found in New York. The single fact, that she is the heart of the money market of this country renders it impossible for her to suffer any general calamity, or sustain any injury to her credit, without its consequences being immediately felt by the remotest part of the union. So intimate are the ties, so close the connection, and so entire the dependency of the other commercial cities of the Union, except Boston, of which we shall hereafter speak, upon New York, that every shock that her credit receives, is, with the celerity of the mail, communicated throughout the country. This is true, not only of New York, but of London, and every other great city, in which the exchanges of a nation are made. And it is not only in modern times, that this truth has been acknowledged, for we have it expressly announced by Cicero, in his celebrated speech in favor of the *Lex Manlia*—*Nam tum cum in Asia, res magnas, permulti amiserunt, scimus Romæ, solutione impedita, fidem concidisse. Hæc fides, atque, hæc ratio pecuniarum quæ Romæ, quæ, in foro, versatur, implicita est cum illis pecuniis asiaticis et cohæret. Ruere illa non possunt, ut hæc non eadem labefacta motu concidant.* When New York suspended, the demands for specie on the banks of the other States commenced—it was literally a *run for the specie*—and "in a short time," (says Mr. Colcock, the President of the Bank of the State, in his official report to the legislature for the year 1839,) "we would have been drained of all the specie we possessed, and compelled to have stopped business, and have had to add to the calamity by which the country was nearly overwhelmed by pressing our debtors for payment. Specie, at once, by the suspension, commanded a higher price than before it—it became valuable for exportation, and afforded brokers and others the opportunity to

make profit out of the calamities of their fellow citizens. The banks of Charleston, therefore, suspended, and the legislature, after the resumption, declared itself satisfied with their condition. None can doubt, that so long as a dollar of paper was in circulation, that it would have been called for in specie. The demand which grew out of the avarice of brokers and agents of New York houses, would have soon been increased by the apprehensions and fears of note holders, as was the case in England, in 1797. P. 496, M'Cullock and Smith. With all their ability, the counsel for the State have not yet suggested the means, for indeed none can be suggested, whereby the drain of specie, in 1837, could have been stopped. So long as it was wanted, so long it would have been demanded. To re-supply themselves during the run was impossible, for specie could not have been obtained at any price in New York, or elsewhere. The banks there refused to disburse it, and if any merchants possessed it, it was held for exportation, and the payment of their own foreign debt. In England, too, the run upon the banks would have rendered it impossible to obtain it for American use, even if the delay had been of no importance.

At the very time, too, when New York, the specie market of the country, required all of it, that she could procure, to sustain her credit, the celebrated specie circular was issued by our government. "The only effect of that measure, so far as it has been ascertained," says Mr. Gallatin, "was to cause a drain of specie on the banks of New York. It transferred specie from the place where it was most wanted for the advantage of the country, to the west, so that whilst it was on the way to Detroit, the Secretary was obliged to draw heavily on Michigan, in favor of New York, and other sea ports. Had no interference taken place, the public lands would have been paid for in eastern funds, and this double transportation would have been saved." Undoubtedly government was not abetting in the production of suspension,—but the foreign demand for specie, aggravated by the specie circular, produced precipitately the suspension of specie payments. *No human prudence could guard against such a conjuncture. The fatal consequences which followed, are the necessary and inseparable incidents to a paper currency.* It was impossible that, cut off, as she was, from her ordinary sources of supply, and debtor to Europe on behalf of the Union to an enormous amount, New York could meet the demand for specie. Her

suspension compelled the banks south and west of her to do the same. Boston did not imitate New York, because she is the great manufactory creditor of the Union. Her trade is chiefly with the States, through New York; in other words, she is a creditor of New York.

The intention of the legislature, in establishing this bank, was not, it is true, to produce suspensions, as desirable events; nor, on the other hand, to create a currency at all times immediately convertible into specie, but it was to create institutions upon principles believed to be sound at the time of their establishment, and which secured to the State a currency generally payable on demand, and always ultimately convertible into coin, yet subject occasionally to suspensions. The true evil under which it had groaned, was not a currency based upon credit, but an *irredeemable* currency—one which was not ultimately convertible into gold and silver. It was to remedy this evil, that this bank was chartered. This is not a mere assertion for the nonce, but an opinion derived from an old tract, supposed to be written about the year 1745, which is printed in the Appendix to Statutes at Large, 9 vol. 778, wherein the currency of South Carolina is treated of. It recites a part of the preamble of the royal instructions to the General Assembly of the State, to wit: "And whereas, great inconveniences have happened in South Carolina, from issuing large sums of paper money, *without sufficient fund for the gradual repaying and cancelling the same.*" So the author says, in reference to the act which was passed, that as that act will "determine with the present session of the General Assembly, the said currency will be *without a fund* to support it." For he informs us, that though the royal assent to the issuing of paper in this instance, was upon condition that funds were provided for its redemption, the Assembly issued the paper, but disregarded the condition. This was the evil under which South Carolina groaned, not a currency inconvertible on demand into specie, though ultimately good, but an irredeemable currency —paper money, for the redemption of which, no funds were, or would be provided. This condition of things continued until the year 1782, when the acts which had at various times been passed, making paper money legal tender, were repealed. All the emissions of paper money until this time, had been based upon the honor and faith of the State; but as in the times previous, the same

mischief existed, and of which the author of the tract above mentioned complained, to wit, that no funds were, or would likely be provided, to redeem this paper currency,—that the currency was irredeemable—not convertible into any thing. From the year 1782 to the year 1801, when a charter was granted to the defendant, only gold and silver coin were legal tender. Now it is manifest, that previous to the year 1782, the evils endured by the State did not flow from a currency based upon credit, but from an irredeemable currency, which was not convertible into any thing. The foundation of a currency based upon credit, is "the confidence placed in the ability of the issuers to retrieve them when presented for payment, or when they become due." But as to paper made legal tender, "no part whatever of the value of such paper money is derived from *confidence*. It circulates because it is made legal tender, and because* the use of a circulating medium is indispensable." And so it appears from the preamble of the act of 1746, 3 Statutes at Large, 671: "Forasmuch as it is absolutely necessary in all countries, and places, wherein is carried on any considerable trade and commerce, there should be a sufficient currency, or medium of trade therein," &c. and the act then proceeds to authorize the emission of bills of credit, and makes them *legal tender*. It is a mistake, therefore, to call a paper money made legal tender, such as existed previous to 1782 in South Carolina, a currency based *upon credit*. The currency previous to that time, circulated, because there was no other "medium of trade."

From the year 1783 to the year 1787, gold and silver coin, by act of the General Assembly, was the only legal tender in this State. By this measure, they had entirely destroyed the source of all the evils, under which South Carolina had groaned in her infancy; and by the depreciation act of the same year, provision was made to redeem the paper money which had been issued, in gold and silver. Then came the constitution of 1787, whereby States were prohibited from issuing bills of credit, or making any thing but gold and silver coin a legal tender. In 1789–90, the Bank of South Carolina began to do banking business as an incorporated company. At that time, only gold and silver were legal tender, by the laws of our own State, and of the constitution of the United States. Until it began to issue paper, the only currency was specie.

* Smith & M'Cullock, 790.

It could not, therefore, be for the purpose of making the payment of specie more sure, that this bank was created. On the contrary, the effect of an emission of paper—the creation of a paper currency is to render specie payments less sure,—in the language of the Attorney General, p. 108, "to drive every other currency out of circulation."

We submit, therefore, that *the end and design of the founders was to create a currency less costly than specie, for the redemption of which, funds had been provided.* The State had suffered from a paper currency, which was irredeemable, and which therefore it abolished. It now created a paper currency which was redeemable, and which seemed therefore to unite all the advantages of a paper with a specie currency. If our remarks are confirmed by the facts, then the Bank of South Carolina has *not* defeated the great public objects of its creation.

Then it is argued, that our defence may be sufficient to induce the legislature to pardon suspension, but is not a *legal justification.* It is submitted, however, that if suspension be an inherent defect of the whole system, if it cannot be avoided by human prudence, it is no cause of forfeiture. The legislature must be presumed to have understood the nature and consequences of its contract; and whether it did or not, if suspension is one of its "necessary and inevitable consequences," the State cannot invalidate its own contract.* The State, no more than an individual, can demand a rescision of its contract, because it does not produce all the benefits which were expected. "The price and terms on which these chartered privileges are given, are thus expressed in the ordinary language of a bargain between man and man, and the State is bound, not only by the constitution of the United States, but by what is of higher urgency, by the obligations of public faith, and the immutable principles of justice, to abide by it. It would be far better for the commonwealth to suffer any evils, which a rash and indiscreet contract may have brought upon her, that even seem to act inconsistent with the character of a government whose honest boast, from its origin, has been 'unbroken faith.'" The Commonwealth *ex rel.* Alberti, v. United States Bank. Even by the sternest rule of the common law—the law of carriers—the

* *Ante*, p. 17, and 6 Cranch, 87.

carrier is not responsible for a loss that resulted from some cause which human prudence and foresight could not have avoided. Rice's Rts. 114. But the legislature are as deeply culpable as the banks; if the latter have committed any offence, the former are accomplices before the fact. To attempt now to cast the blame upon its accomplice, for doing what it has granted the right to do, is a more manifest want of faith than that involved in the crime of suspension. It becomes, therefore, the counsel for the State, who have its honor in charge, to consider that our interpretation of the contract will be "*for the honor of the king, which ought to be more regarded than his profit.*" Comyn Dig. Grant. G. 12.

But it is said, that although the suspension of 1837 might have been unavoidable, that of 1839 was not; and, therefore, was culpable. If any suspension is unavoidable, the necessity must be judged of by the banks. For the legislature can never be consulted beforehand, and hence the act of 1840, admitting that suspensions are unavoidable, and that the banks must determine of the necessity, imposes a tax of five per cent. per annum on its issues. It will be remembered, too, that in 1837-8, the bank of the United States had disturbed the ordinary course of trade, by becoming the greatest cotton broker in the Union. Her wild and illegal speculations had given her the command of almost the entire exchange of the country. The sudden revival of business produced by these operations, and the renewal of specie payments in some places, led the country to suppose that the danger was past, and that the redundancy of the currency had ceased. New foreign debts were contracted, and in the year 1839 the imports exceeded the exports by the sum of $40,000,000*. Thus, while the natural remedy for a redundancy was operating, it was checked by a new debt, and the disease aggravated by the Bank of the United State.† Another suspension took place, or rather the former suspension was continued, for the causes which produced the first had not ceased to operate. It may be affirmed, says Mr. Gallatin, p. 45, that that bank, (United States Bank,) subsequent to the first general suspension of May, 1837, has been the principal, if not the sole cause of the delay, in resuming, and of the subsequent suspensions. In every respect, it has been a public nui-

* Gallatin, 42. † *Ibid.*

sance. The original error consisted in the ambitious attempt to control and direct the commerce of the country.

We have thus attempted to give a sketch of the causes of the suspension, and the conduct of the banks of South Carolina, in 1837–8–9. To them, no part of the blame of over issues has been ascribed. They suspended in self-defence, and to prevent the evils to the community, which must necessarily follow, from an attempt by them to sustain the payment of specie against a foreign demand, having no reference to their own solvency.

But we think, that upon a review of the conduct of the State, in reference to suspensions, to wit, the non-convertibility of paper into specie, upon demand—it will be found, that our construction of the charter is correct. The Bank of South Carolina, after having been an unincorporated company for ten years, obtained, in 1801, a charter of incorporation. It continued to do business until the year 1812, without any complaint against it; although in the mean while, all the banks in the Middle and Southern States, and including this bank, had been paying specie sparingly, and reluctantly. In that year, these banks entirely suspended their specie payments. During the continuance of this suspension, the legislature, "for the purpose of discounting paper, and making loans," &c. established the Bank of the State of South Carolina. No season could be more proper for the expression, by the legislature, of its abhorrence of suspensions—of its belief that they are pernicious to the common weal—that they are breaches of faith, and cause "failure, defeat, and frustration of the objects of the corporation," to wit, the immediate convertibility of paper into specie, than when the legislature itself was establishing a bank for its own use and profit. Above all, it was due to the country, that it should take care to render it impossible that its own bank could suspend, and thereby break the faith, and stain the honor and credit of the State. But so far was the legislature of 1812 from expressing such sentiments, or making such provisions, that it created a bank upon credit alone, and declared that "the faith of the State" is pledged for the solvency of the bank. What was its capital? Stock of the United States—loan office bonds—shares in the State and Planters' and Mechanics' Bank—bonds and notes due the State, &c. &c.—*but not one dollar in specie.* Moreover this stock—these bonds and notes, &c. could not, at the time, be converted into specie, be-

cause every bank had suspended. Even the very banks in which the State held stock, and which was made *part of the capital* of its own bank, were unable to redeem their notes—*were suspended.* Thus the capital of the bank—its very life-blood—was an inconvertible paper currency; and as it was born in suspension, so, as it will hereafter be seen, it was nurtured by it. Either, therefore, the legislature did not regard the immediate convertibility of paper into coin, as the condition of the charter, as essential to a sound currency,—to the welfare and the honor of South Carolina, or it deserves that the utmost opprobrium should be heaped upon its memory. For in the latter case, it created an institution which, in its own opinion, took "usury"—"robbed honest industry of its reward"—and was "subversive of our liberties." The character of that legislature is evidently, therefore, deeply interested in the decision of this case; and the judgment of this court will pronounce it honorable or infamous. Again, in the year 1814, was another general suspension, in which, both the defendant, and the Bank of the State, participated. This continued for two years and six months—until February, 1817. During this period of suspension, to wit, in 1815, the defendant applied for an amendment of its charter. Here was another opportunity for the legislature to have expressed its condemnation of an inconvertible currency. All its banks were suspended—all had broken the alleged condition of their grant—all had refused to redeem their notes and deposits; but, instead of censuring them—instead of condemning this defendant for its breach of faith, it actually granted it new and valuable privileges,—and thereby enabled it to continue, and with more deleterious force, its issues of inconvertible paper. So again in the year 1817, but a few months after the renewal of specie payments, other and beneficial privileges were granted to all the banks of the State. And it is matter of history, that about the year 1818, some of the politicians of the State began to clamour against the banks, and chiefly the Bank of the State of South Carolina, on account of suspensions. As in these latter days, so then, it seems, much rhetorick that could illy be spared, was spent by self-styled friends of the people, and self-appointed conservators of public morals, in attempting to induce the legislature to censure the conduct of these banks. But their success was not commensurate with their exertions; in fact, they not only failed, but were severely chastised

—for the matter was brought to the notice of the legislature, by Mr. Stephen Elliott, then President of the Bank of the State, in his official report, for the year 1819. (This report, with other documents, were republished in 1841, by order of the General Assembly.) And after remarking with some *sharpness* about persons who said much about banks, though they "*were apparently very little acquainted with their principles*," he proceeds to show, by facts and arguments, that suspension is no mark either of fraud, or insolvency. "It will be found, (says he,) as it has been pronounced, an *absurdity*, to require specie payments from banks with a paper currency throughout the country." Here is the doctrine very strongly put, that bank paper *cannot* be kept at all times convertible into specie. Here we have the deliberate opinion of the State's own officer—the chosen guardian of the pecuniary chastity of the State—and that opinion *officially* expressed—maintaining it to be an absurdity, to say, that a paper currency, at all times convertible into specie, can exist in this country. Now we place no weight upon this opinion, *as an opinion*,—but it is deserving of great consideration, as an *official report adopted by the legislature.* What would have been the course of the legislature of 1841, if the then president of the bank had sent it such a report? The report would have been thrown under the table, and the officer censured and removed. Why? because it would have considered such doctrines as monstrous—as leading to non-convertibility of paper—to suspension—to breach of faith—to all the evils mentioned in the argument of the counsel. But the legislature of 1819 thought, and therefore acted, differently; they adopted, and printed the report—they did not censure the officer—they re-elected him the same session during which his report was made, and subsequent legislatures continued him in office, until his death, in 1830.

Can any body doubt, that the legislature of 1819 did not regard suspension as a breach of faith? as a perversion of the end and design of the corporation? Mercy, for its character, forbids the suspicion. Again, in 1837, the banks of this State suspended, and the legislature met during the suspension, and adjourned, without uttering a word of censure. This suspension continued until September, 1838. At the meeting of the legislature, in the month of December of the same year, 1838, the subject was reported on, by the Committee of Ways and Means, and they said, and the

legislature adopted the report, that "they believe they (the banks,) are in a sound condition." Not a word of censure—not a hint, that suspension was a cause of forfeiture. Here is the legislature, of so late a date as December, 1838, solemnly affirming to the people of the State, that a bank, which but three months before, had ceased to issue inconvertible paper, was in a sound condition. Did this legislature regard suspension as a breach of the charter, and these banks as public nuisances, that ought to be abated? And if it even be true, as alleged, that suspensions were always considered as nuisances, so much the greater reason had these successive legislatures for prohibiting them, if avoidable; and it is only upon the ground, that they regarded them as unavoidable, that their conduct is reconcileable with honesty and duty to their constituents. The same remark is applicable, too, and perhaps with greater force, to the legislature of 1840. Thus we have seen, that during a period of twenty-seven years, from 1812 to 1839, the Bank of South Carolina had suspended whenever it was deemed necessary, without censure, and without the slightest intimation, that thereby its charter was forfeited. It was an usage, that had not only been practised, but had been defended and justified as right and just, and necessary, not only by this bank, but by the State's own bank, and that, too, in the face of the legislature. The legislature, notwithstanding this conduct, so well calculated to excite its indignation, if it disapproved of the doctrine, had acquiesced. Is this not a clear legislative construction of the charter? Has not the State for twenty-seven years confessed that the immediate convertibility of paper into coin, upon demand, was not the implied condition of the grant? No other construction can be put upon the conduct of these successive legislatures, without impugning their honesty.

Then it is said, true it is the legislature did acquiesce in those suspensions, but it has not acquiesced in the suspensions of 1837–9, and that therefore it has not waived its right to a forfeiture. P. 108. But the argument is open to this serious objection, that it begs the question—it assumes what must be proven, the existence of the right of forfeiture. We think that it is very manifest that the past history of the State, the provisions of the charter, and the rules of construction, altogether negative such an idea.

But it is further to be observed, that while the bank on the one side has claimed and used for twenty-seven years, without let or

hindrance, the right to suspend, and not as by permission, but *as by right*, the State on the other hand never denied it, and always acquiesced. The State, during that long period, never used, nor even hinted a claim to the penalty of forfeiture, although frequent opportunities had occurred, in which it might have been employed. If these be the facts, as unquestionably they are, then the authority of Lord Coke is clearly against the construction which would imply the existence of such a right. "And as usage," says he, "is a good interpreter of laws, so *non-usage, where there is no example*, is a great intendment, that the law will not bear it; for, saith Littleton, if any action might have been grounded upon such matter, it shall be intended that some time it should have been put in use. Not that an act of parliament by non-user can be antiquated or lose its force, but that it may be expounded or declared how the act is to be understood." 1 Coke Litt. 22, Thomas' Ed.

If an individual stood in the place of the State, certainly he would not be allowed, after an acquiescence of such duration, to contest this right. Not only would the law restrain him, but the just indignation of his fellow citizens would fall upon him, in hissing and scorn. Yet the legislature, the fountain of justice, claim this right, the existence of which can only be shewn by staining itself with breach of faith to its creditors, and infidelity to its constituents. But unless the contracts of the State are governed by rules different from those applicable to the contracts of individuals, the court must decide against it. In other words, the State must shew that it is not bound by the general rules of the law of contracts. Such a principle cannot be maintained without directly contradicting the decisions of the Supreme Court of the United States. Seeing, moreover, that the interpretation put upon the contract by the legislature of 1840, and the counsel, will necessarily impugn the honor of the State, the court ought to adopt the *sentiment* of Lord Coke, in Bonham's case, (where an act of parliament is against common right, it is void, which Lord Holt said was "a very reasonable and a true saying,) as modified by Blackstone, that if any unreasonable consequence would follow from a certain construction of an act, "the judges are, *in decency*, to conclude that this consequence was not foreseen by the legislature," and "therefore they are at liberty to expound the statute by equity,

and *quoad hoc* to disregard it."* To prevent this consequence, the court, in *decency*, will adopt our construction. Thus it will preserve the honor of the State, and at the same time will determine that what is law for the master, is law for the servant—that the legislature, as well as the people, are "*sub deo et sub lege.*"

I have now stated the grounds upon which I rely, in defence of the Bank of South Carolina. I have answered, I think, conclusively, the argument† for the prosecution. I have shewn, that there can be no misuser without a fraudulent intent, averred and found by a jury; that to imply the existence of the penalty of forfeiture in the present case, is against the well settled rules of construing contracts; that the directors, in that character, cannot, by their acts, bring upon the corporation the penalty of forfeiture; that from the charter, and from the conduct of the State itself, it is manifest that suspension is not a breach of the implied condition of the charter.

My arguments have been derived from the ancient masters of the law, and I have adopted the comments of those great lawyers who proved their devotion to popular freedom, by resisting the illegal and arbitrary principles devised by profligate lawyers to establish the power of a despot. I have called upon your Honors to vindicate the character of the State from the aspersion that she has broken her faith. I have besought your Honors to maintain the independence of the judiciary. Its independence, its learning, and integrity, have ever been the boast of the people of South Carolina. With a noble pride, they have heretofore proclaimed themselves a law-governed people; they have rejoiced that they could unrol the long catalogue of their judges, and defy malice to point to one of them who had proved himself unworthy of their reverence, by his subserviency to party. May this court long deserve and possess the reverence of the people. Party zeal may, in the moment of its frenzy, revile it; and rash men, whose better natures are subdued by political fanaticism, may attack, with blind fury, that which is most worthy of their love and veneration.

*1 vol. 60.

†I have quoted, in almost every instance, the *language* of the Attorney General; and in those few instances that I have not, it has been for the sake of brevity. I refer altogether to the argument, for May term, 1843, printed by W. Riley, 41 Broad street, 1843.

Schemes may be suggested to alter the constitution, in order that party may make the judiciary the instrument of effecting its own purposes. A political senate *has* been proposed, with authority to revise the decision of the judges and construe the law—to render, in fact, the majority of the hour, the arbiters of every man's life and fortune—a tribunal, which has no precedent but the iniquitous star-chamber—which in its operations would prove to be a many-headed Jeffreys, with greater power and less conscience. But I trust, that this learned bench will, notwithstanding, continue honored and useful, administering the law, as it always has done, with independence. I trust, that no unwise innovations will receive its sanction. I trust, that the decision in this case may illustrate that the constitution and the law are conjoint and inseparable—one and indivisible—a temple and a fortress—a fortress which no rude invader can assail with success—a temple that no profane hands can touch with impunity.

In conclusion, may it please your Honors, I claim for the Bank of South Carolina no exemption from the law. On the contrary, it does homage to the majesty of the law, and lays its charter with submission at the feet of her ministers. I have fought my fight. It is for your Honors now to pronounce judgment.